Docket for 03-878

(10)

No. 03-878
Vide 03-7434
Title: A. Neil Clark, Field Office Director, Seattle, Washington, Immigration and Customs Enforcement, et al., Petitioners

v.

Sergio Suarez Martinez

Docketed: December 18, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (03-35053)
Decision Date: August 18, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 6 2003	Application (03A401) to extend the time to file a petition for a writ of certiorari from November 16, 2003 to December 16, 2003, submitted to Justice O'Connor.
Nov 7 2003	Application (03A401) granted by Justice O'Connor extending the time to file until December 16, 2003.
Dec 16 2003	Petition for a writ of certiorari filed. (Response due January 20, 2004)
Jan 19 2004	Motion for leave to proceed in forma pauperis filed by respondent Sergio Suarez Martinez.
Feb 4 2004	DISTRIBUTED for Conference of February 20, 2004.
Feb 23 2004	DISTRIBUTED for Conference of February 27, 2004.
Mar 1 2004	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 1 2004	Petition GRANTED This case is consolidated with No. 03-7434, Benitez v. Wallis, and a total of one hour is allotted for oral argument.
Mar 11 2004	Motion to appoint counsel filed by respondent Sergio Suarez Martinez.
Mar 16 2004	Extension of time within which to file respondent's brief on the merits in No. 03-7434 to and including April 26, 2004.
Mar 24 2004	Motion DISTRIBUTED for Conference of April 16, 2004.
Apr 12 2004	Extension of time in No. 03-878 within which to file the joint appendix and petitioners' brief on the merits to and including May 7, 2004.
Apr 12 2004	Further extension of time in No. 03-7434 within which to file respondent's brief on the merits to and including May 7, 2004.
Apr 14 2004	Motion to dispense with printing the joint appendix filed by petitioner.
Apr 19 2004	Motion to appoint counsel filed by respondent GRANTED. Christine S. Dahl, Esq., of Portland, Oregon is appointed to serve as counsel for the respondent in this case.
Apr 26 2004	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
May 7 2004	Brief of petitioners Phil Crawford, et al. filed.
May 7 2004	Brief amici curiae of Washington Legal Foundation, et al. filed. VIDED.
May 26 2004	Motion for additional time to argue and for divided argument filed by counsel for Martinez and Benitez. VIDED.
May 27 2004	Extension of time within which to file respondent's brief in No. 03-878 on the merits to and including July 19, 2004.
May 27 2004	Application (03A982) to extend the time to file a reply brief on the merits in No. 03-7434 from June 11, 2004, to July 17, 2004, submitted to Justice Kennedy.

May 28 2004	Application (03A982) granted by Justice Kennedy extending the time to file until July 16, 2004.
Jun 14 2004	The motion of Martinez and Benitez for divided argument is granted. The request for additional time for oral argument is denied.
Jul 9 2004	Application (04A32) to extend further the time for filing the reply brief on the merits in No. 03-7434 from July 16, 2004 to August 2, 2004, submitted to Justice Kennedy.
Jul 11 2004	Further extension of time within which to file respondent's brief on the merits in No. 03-878 to and including August 2, 2004.
Jul 12 2004	Application (04A32) granted by Justice Kennedy extending the time to file the reply brief on the merits to and including August 2, 2004.
Aug 2 2004	Brief amici curiae of Cuban American Bar Association, et al. filed.
Aug 2 2004	Record received from U.S.C.A. 9th Circuit. (1 folder)
Aug 2 2004	Brief amicus curiae of National Refugee Resettlement and Advocacy Organizations filed.
Aug 2 2004	Brief of respondent Sergio Suarez Martinez filed. (Distributed)
Aug 2 2004	Brief amici curiae of Religious Organizations, Church World Organization, et al. filed. (Distributed)
Aug 2 2004	Brief amici curiae of Stuart E. Eizenstat and Thomas W. Pickering filed. (Distributed)
Aug 3 2004	Record received from U.S. D. C. for District of Oregon. (1 envelope)
Aug 5 2004	CIRCULATED.
Aug 24 2004	SET FOR ARGUMENT Wednesday, October 13, 2004.
Sep 7 2004	Reply of petitioners A. Neil Clark, Field Office Director, Seattle, Washington, Immigration and Customs Enforcement, et al. filed. (Distributed)
Oct 13 2004	Argued. For Martinez: Christine S. Dahl, Assistant Federal Defender, Portland, Ore. For Benitez: John S. Mills, Jacksonville, Fla. For United States; Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), this Court avoided constitutional concerns by interpreting 8 U.S.C. 1231(a)(6) to limit to a "reasonable time" the period that permanent resident aliens may be detained following final orders directing their removal from the United States. Applying that standard, the Court held that a resident alien generally may not be detained under Section 1231(a)(6) for more than six months after being ordered removed, if the alien demonstrates that there is not a significant likelihood of removal in the reasonably foreseeable future. The question presented in this case is whether Section 1231(a)(6) and *Zadvydas* compel the release of an arriving alien who was apprehended at the border of the United States, denied admission, and ordered removed from the United States.

PARTIES TO THE PROCEEDINGS

Petitioner Phil Crawford, Interim Field Office Director, Portland, Oregon, United States Immigration and Customs Enforcement, is the successor to Ronald J. Smith, District Director, District of Oregon, Immigration and Naturalization Service, who was a respondent below. John Ashcroft, Attorney General of the United States, also is a petitioner and was a respondent below.

Respondent is Sergio Suarez Martinez.

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In the Supreme Court of the United States

No.

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Interim Field Office Director, Portland, Oregon, of United States Immigration and Customs Enforcement, Department of Homeland Security, and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

[1] On March 1, 2003, functions of several border and security agencies, including certain functions of the former Immigration and Naturalization Service (INS), were transferred to the Department of Homeland Security and assigned within that Department to the entity now known as United States Immigration and Customs Enforcement. See Homeland Security Act of

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The order of the district court (App., *infra*, 2a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2003. On November 7, 2003, Justice O'Connor extended the time within which to file filing a petition for a writ of certiorari to and including December 16, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift. After Cuba refused to accept the return of Mariel Cubans who were stopped at the border and denied entry into the United States, the Attorney General, through the Immigration

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2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). Petitioner Crawford is the successor to the INS District Director who was named as a respondent to the habeas corpus petition in the district court. The Attorney General also was named as a habeas corpus respondent in the district court. The position of the government, however, is that the Attorney General is not a proper habeas corpus respondent in this action concerning an alien's detention. See *Roman* v. *Ashcroft*, 340 F.3d 314, 318-327 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994); but see *Armentero* v. *INS*, 340 F.3d 1058, 1061 (9th Cir. 2003) (determining that Attorney General is proper habeas respondent in "circumstances specific to the situation of immigration detainees"), petition for rehearing en banc pending, No. 02-55368 (9th Cir.).

and Naturalization Service, soon paroled all but a few hundred of those Cubans into this country pursuant to his discretionary authority under 8 U.S.C. 1182(d)(5) (1976 & Supp. IV 1980). See generally *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578-579 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101-102 (4th Cir. 1982).

Section 1182(d)(5)(A) then authorized, and as amended continues to authorize, the Attorney General (now the Secretary of Homeland Security, see note 1, *supra*) to parole aliens applying for admission to the United States into the country "temporarily under such conditions as he may prescribe" and only for "urgent humanitarian reasons or significant public benefit," but it provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

In 1984, the United States and Cuba reached an accord concerning immigration between the two countries, including the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental infirmities. See Immigration Joint Communique Between the United States of America and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057, 1984 WL 161941. Approximately 1652 Mariel Cubans have been repatriated to Cuba under the 1984 accord. The most recent repatriations occurred in October and December 2003. See generally *Gisbert* v. *United States Attorney*

General, 988 F.2d 1437, 1439 n.4 (5th Cir. 1993) (discussing repatriations).

Pursuant to Section 1182(d)(5)(A), the Attorney General promulgated regulations in 1987 governing the parole and revocation of parole of Mariel Cubans (defined to include any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980) pending either an exclusion hearing or the alien's return to Cuba or another country. See 8 C.F.R. 212.12; 52 Fed. Reg. 48,802 (1987). Those regulations supplement the general regulations governing the parole and release of aliens who are seeking admission to the United States. See 8 C.F.R. 212.5, 241.4.

In 1990, Congress added a new statutory provision, 8 U.S.C. 1226(e) (1994), which limited the Attorney General's power to release certain excludable, criminal aliens on parole. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(b), 104 Stat. 5050. Section 1226(e)(1) provided that, "[p]ending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony." 8 U.S.C. 1226(e)(1) (1994). Section 1226(e)(2) and (3) then provided that the Attorney General "shall not release such felon from custody" unless the Attorney General determined under 8 U.S.C. 1253(g) (1994) that the alien's country of removability would not accept his return and, *inter alia*, the Attorney General concluded, after review of the alien's request for release and the severity of the alien's felony, that "the alien will not pose a danger to the safety of other persons or to property." 8 U.S.C. 1226(e)(2) and (3) (1994). Section 1226(e) otherwise left unaffected the Attorney General's discretion to grant, deny, or revoke parole under Section 1182(d)(5)(A).

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 241, 110 Stat. 3009-546, Congress added a new Section 1231 to Title 8 of the United States Code. Section 1231(a)(2) requires the detention, during the statutory 90-day removal period, of aliens who have been ordered removed from the United States, including aliens who have been stopped at the border and were regarded as "excludable" under prior law.[2] Section 1231(a)(6) then provides that an alien ordered removed who is inadmissible under 8 U.S.C. 1182 or deportable for the commission of a specified crime, or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, "may be detained beyond the [90-day] removal period."

2. In June 2001, this Court decided *Zadvydas* v. *Davis*, 533 U.S. 678, which addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) of aliens who initially had been granted the status of lawful permanent residents and later were ordered removed, but who could not be removed within the 90-day statutory removal period. The Court construed Section 1231(a)(6) "to contain an implicit 'reasonable time'

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[2] Before IIRIRA, aliens subject to removal from the United States were divided into two statutory categories. Aliens seeking admission and entry into the United States were "excludable." See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182 (1994). Aliens who had gained lawful admission to the United States or entered without permission were "deportable." See 8 U.S.C. 1251 (1994). Under IIRIRA, the new statutory category of "inadmissible" aliens includes both aliens who have not entered the country and formerly were termed "excludable," and aliens who entered the United States without permission and formerly were termed "deportable." See 8 U.S.C. 1182(a).

limitation." 533 U.S. at 682. In particular, to avoid "a serious constitutional problem," *id.* at 690, that would arise from indefinite detention of the former permanent resident aliens, the Court construed the Attorney General's authority to detain such aliens under Section 1231(a)(6) to be limited to the period of time reasonably necessary to remove them from the United States. *Id.* at 689. After that point, the Court reasoned, "detention no longer 'bears a reasonable relation to the purpose for which the individual was committed.'" *Id.* at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (brackets omitted)). "[F]or the sake of uniform administration," the Court further determined that detention for a period of six months is presumptively reasonable. *Zadvydas*, 533 U.S. at 701. After that presumptively reasonable period, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Ibid.*

The Court emphasized in *Zadvydas* that "[a]liens who have not yet gained initial admission to this country would present a very different question," which was not before the Court. 533 U.S. at 682. Furthermore, in its analysis of the potential constitutional problem posed by detention of deportable permanent resident aliens, the Court rejected the United States' reliance on *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), even though that case "involve[d] indefinite detention." 533 U.S. at 693. In *Mezei*, the Court held that the detention of an alien who unsuccessfully sought entry into the United States but could not be removed did not violate due process. See 345 U.S. at 210-216. In *Zadvydas*, the Court stated that *Mezei* "differs from [*Zadvydas*] in a critical respect," because Mezei's detention on Ellis Island was a continuation of his exclusion rather than a successful entry into the United States. 533 U.S. at 693. The Court noted that aliens stopped at the border remain applicants seeking initial admission to the United States even if they are physically present in the country. *Ibid.* Mezei's status as an excludable alien at the border, the Court explained in *Zadvydas*, "made all the difference." *Ibid.*

3. In this case, the Ninth Circuit—in conflict with a majority of the circuits that have addressed the issue, but in agreement with the Sixth Circuit—determined that *Zadvydas*'s six-month rule requires the release from detention of an inadmissible Mariel Cuban with an extensive criminal history.

a. In June 1980, respondent arrived near Key West, Florida, and was prevented from entering the United States. Later that month, the INS granted respondent temporary immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A). Gov't Supp. Mot. to Hold in Abeyance These Proceedings Pending Disposition of the Petition for Rehearing *En Banc* of *Xi* v. *INS* and the Accompanying Mot. for Expedited Consideration of the Pet., Attach. A at 2 (filed Sept. 9, 2002) (Gov't D. Ct. Supp. Mot.); see Resp.'s Sworn Statement in Exclusion Proceedings (dated 6/20/80) (contained in respondent's agency file). Respondent was convicted of numerous crimes while he was on immigration parole. In 1983, respondent was convicted of assault with intent to murder and sentenced to three years of probation. Gov't C.A. Resp. to Mot. for Summary Affirmance and Request for Summary Disposition 3 (filed July 10, 2003) (Gov't C.A. Resp.). Later in the 1980s, respondent was convicted of additional crimes including burglary. *Ibid.*; Gov't D. Ct. Supp. Mot. Attach. B at 37. In October 1996, respondent was convicted in California of petty

theft with a prior conviction and, following the revocation of his parole for that offense, was sentenced to two years of imprisonment. *Id.* at 22, 23. In July 1998, respondent was convicted in California of assault with a deadly weapon other than a firearm and sentenced to three years of imprisonment. *Id.* at 12. In July 1999, he was convicted in California of attempted oral copulation by force and sentenced to two years of imprisonment. *Id.* at 1.

In December 2000, the INS revoked respondent's immigration parole and commenced removal proceedings against him based on his criminal convictions and his lack of valid documents for entering the United States. Gov't C.A. Resp. 3-4; Gov't D. Ct. Supp. Mot. 3 and Attach. A at 1-2. In January 2001, an immigration judge determined that respondent is removable and ordered him removed to Cuba. Respondent waived an administrative appeal. Gov't C.A. Resp. 4; Gov't D. Ct. Supp. Mot. Attach. C at 1.

As required by the parole regulations applicable to Mariel Cubans, see 8 C.F.R. 212.12(g), the INS (now United States Immigration and Customs Enforcement, see note 1, *supra*) has reviewed respondent's custody status on an annual basis. After each review, respondent has been found ineligible for re-parole, as a potentially violent person and a threat to the community if released. Gov't C.A. Resp. 4; see 8 C.F.R. 212.12(d).

b. In July 2002, respondent challenged his detention in a habeas corpus petition filed under 28 U.S.C. 2241 in the United States District Court for the District of Oregon. App., *infra*, 3a. In August 2002, while respondent's habeas corpus petition was pending, the Ninth Circuit held in *Lin Guo Xi* v. *INS*, 298 F.3d 832 (2002), "that *Zadvydas* applies to inadmissible individuals" who have been stopped at the border, denied admission,

and ordered removed from the United States under the post-1996 immigration laws, *id.* at 836, and, therefore, the detention of such aliens is subject to the reasonable-time limitation and six-month presumption established by this Court in *Zadvydas*, see *id.* at 839-840.

On October 30, 2002, the district court granted respondent's habeas corpus petition and ordered the government to release respondent, subject to reasonable conditions. App., *infra*, 2a. On March 31, 2003, following the imposition of conditions of parole and identification of appropriate community placement, see 8 C.F.R. 212.12(f), respondent was released from detention. Gov't C.A. Resp. 5.

c. The court of appeals, citing its decision in *Lin Guo Xi*, *supra*, summarily affirmed the district court's decision ordering respondent's release. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

The question in this case is whether the reasonable-time limitation and six-month presumption that this Court articulated in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), or, alternatively, 8 U.S.C. 1231(a)(6) itself, compels the release of arriving aliens like respondent, who have been apprehended at the border, denied admission to the United States, and ordered removed. A petition for a writ of certiorari that presents the same issues under *Zadvydas* and Section 1231(a)(6), in the context of an alien who was ordered removed before the enactment of the 1996 immigration amendments, is pending in *Benitez* v. *Wallis*, No. 03-7434 (filed Oct. 14, 2003), which arises from the Eleventh Circuit.

The courts of appeals are divided on the question whether *Zadvydas*'s limitation on the duration of post-removal-order detention under Section 1231(a)(6) applies to aliens who have been stopped at the border and

denied admission. The Sixth Circuit and the Ninth Circuit apply *Zadvydas*'s six-month rule to limit the detention of such aliens when there is not a significant likelihood they will be removed in the reasonably foreseeable future. See *Martinez-Vazquez* v. *INS*, 346 F.3d 903 (9th Cir. 2003) (excludable Mariel Cuban); *Arango Marquez* v. *INS*, 346 F.3d 892 (9th Cir. 2003) (same); *Rosales-Garcia* v. *Holland*, 322 F.3d 386 (6th Cir.) (en banc) (same), cert. denied, 123 S. Ct. 2607 (2003); *Lin Guo Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002) (inadmissible alien ordered removed under post-1996 law).

The Third, Fifth, Eighth, and Eleventh Circuits, by contrast, have determined that *Zadvydas* does not limit the detention of arriving aliens who have been denied admission into the United States. See *Sierra* v. *Romaine*, 347 F.3d 559 (3d Cir. 2003); *Benitez* v. *Wallis*, 337 F.3d 1289 (11th Cir. 2003), petition for cert. pending, No. 03-7434 (filed Oct. 14, 2003); *Borrero* v. *Aljets*, 325 F.3d 1003 (8th Cir. 2003); *Rios* v. *INS*, 324 F.3d 296 (5th Cir. 2003). Similarly, the Tenth Circuit has stated after *Zadvydas* that Section 1231(a)(6) preserves agency discretion whether to deny immigration parole to an excluded Mariel Cuban. *Sierra* v. *INS*, 258 F.3d 1213, 1219 (10th Cir.), cert. denied, 534 U.S. 1071 (2001). See also *Hoyte-Mesa* v. *Ashcroft*, 272 F.3d 989 (7th Cir. 2001) (rejecting, after *Zadvydas*, due process challenge to Mariel Cuban's detention), cert. denied, 537 U.S. 846 (2002).

The government has suggested that the petition in *Benitez* should be granted. The government's brief in *Benitez* (at 21) further explains that this Court's construction of 8 U.S.C. 1231(a)(6) (and 8 U.S.C. 1182(d)(5)(A)) in that case would govern the detention of aliens, like respondent in this case, who were denied admission and ordered removed under post-1996 law.

The petition in this case therefore should be held pending the Court's disposition of *Benitez* and disposed of in accordance with the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition in *Benitez* v. *Wallis*, petition for cert. pending, No. 03-7434 (filed Oct. 14, 2003), and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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DECEMBER 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35053
D.C. No. CV-02-00972-OMP
District of Oregon (Portland)

SERGIO SUAREZ MARTINEZ, PETITIONER-APPELLEE

v.

JOHN ASHCROFT, ATTORNEY GENERAL, ET AL.,
RESPONDENTS-APPELLANTS

Filed: Aug. 18, 2003

ORDER

Before: SCHROEDER, Chief Judge, HAWKINS and TASHIMA, Circuit Judges

Appellee's motion for summary disposition is granted because the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment. *See Xi v. INS*, 298 F.3d 832 (9th Cir. 2002).

All the other pending motions are denied as moot.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

CV 02-972-PA

SERGIO SUAREZ MARTINEZ, PETITIONER

v.

RONALD J. SMITH, DISTRICT DIRECTOR, DISTRICT OF OREGON, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., RESPONDENTS

Filed: Oct. 30, 2002

ORDER

Petitioner's motion to dissolve stay and for immediate release (#19) is granted. Respondents' motion to hold proceedings in abeyance (#21) is denied. The petition for habeas corpus relief (#1) is granted. Respondents are ordered to release petitioner immediately subject to reasonable conditions.

DATE this 30 day of October, 2002.

/s/ OWEN M. PANNER
OWEN M. PANNER
U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

CV 3-02-00972-PA

SERGIO SUAREZ MARTINEZ, PETITIONER

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES AND RONALD J. SMITH, DISTRICT DIRECTOR, DISTRICT OF OREGON, IMMIGRATION AND NATURALIZATION SERVICE, ET AL DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
7/19/02	1	Petition for Writ of Habeas Corpus (2241)—Challenge to Execution of Sentence (Federal)—. Filed by Sergio Suarez Martinez against John Ashcroft, Ronald J. Smith. (cmm,) (Entered: 07/24/2002)
7/19/02	2	Motion/Application for Leave to Proceed IFP. Filed by Sergio Suarez Martinez. (cmm,) (Entered: 07/24/2002)
7/22/02	3	Notice of Case Assignment to Judge Owen M. Panner. (cmm,) (Entered: 07/24/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
07/29/02	4	**ORDER**: Order Granting Motion for Leave to Proceed IFP (Related Doc #2). Signed on 7/29/02 by Judge Owen M. Panner. (cmm,) (Entered: 07/29/2002)
		* * * * *
8/20/02	9	Brief in Support of Petition. Filed by Sergio Suarez Martinez. (Related document(s) 1) (Dahl, Christine) (Entered: 08/20/2002)
9/9/02	10	Motion for Stay *the Time for Respondents to File Their Answer to Petition.* Filed by John Ashcroft, Ronald J. Smith. (cmm,) (Entered: 09/10/2002)
9/9/02	11	Declaration of *Kenneth C. Bauman.* Filed by Johnn Ashcroft, Ronald J. Smith. (Related document(s) 10) (cmm,) (Entered: 09/10/2002)
9/9/02	12	Supplemental Motion *to Hold in Abeyance.* Filed by John Ashcroft, Ronald J. Smith. (cmm,) (Entered: 09/10/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
9/11/02	13	Motion for Judgment *and Statement of Opposition to Gov'ts Motion for Stay.* Filed by Sergio Suarez Martinez. (Dahl, Christine) (Entered: 09/11/2002)
9/11/02	14	Motion for Release *Pending Final Disposition.* Filed by Sergio Suarez Martinez. (Dahl, Christine) (Entered: 09/11/2002)
9/13/02	16	**CIVIL MINUTES**: Record of Order—Hearing on Petitioner's Motion for Release is set for 9/30/2002 at 01:30 PM in Portland. Government's response due by 9/23/2002. Ordered by Judge Owen M. Panner. (cmm) (Entered: 09/17/2002)
9/18/02	17	**CIVIL MINUTES**: Record of Hearing—Respondent's Motion to Stay Time to File Answer is granted and a thirty day stay is issued. Simultaneous briefs due by 10/18/2002 on court's authority to impose[] conditions on release of Petitioner. Hearing reset for 10/28/2002 at 01:30 PM in Portland. Ordered by Judge

DATE	DOCKET NUMBER	PROCEEDINGS
		Owen M. Panner. Counsel Present for Plaintiff: Christine Stebbins Dahl. Counsel Present for Defendant: Ken Bauman. Court Reporter: Dennis Grube. (cmm,) (Entered: 09/19/2002)
10/11/02	18	Exhibits *to Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C.* [§] *2241.* Filed by Sergio Suarez Martinez. (Attachments: #1) (Related document(s)1) (Dahl, Christine) (Entered: 10/11/2002)
10/15/02	19	Motion *for Order Dissolving Stay and Directing the INS to Release Him From Indefinite Detention.* Filed by Sergio Suarez Martinez. (Attachments: #1) (Dahl, Christine) (Entered: 10/15/2002)
10/18/20	21	Motion *to Hold in Abeyance These Proceedings Pending the Solicitor General's Decision Whether to Seek Further Review in XI v. INS.* Filed by John Ashcroft, Ronald J. Smith. (cmm,) (Entered: 10/22/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
10/21/02	23	**CIVIL MINUTES:** Record of Order—Hearing set on Respondent's Motion to Hold in Abeyance Proceedings Pending the Solicitor General's Decision[ ] whether to Seek Further Review in XI v. INS (Doc #21) for 10/28/2002 at 01:30 PM in Portland. Ordered by Judge Owen M. Panner, (cmm) (Entered: 10/24/2002)
10/22/02	22	Response to Motion *OF THE INS TO HOLD THESE PROCEEDINGS IN ABEYANCE.* Filed by Sergio Suarez Martinez. (Related motion(s)21) (Dahl, Christine) (Entered: 10/22/2002)
10/30/2002	24	Order granting Petitioner's Motion to Dissolve Stay and for Immediate Release (Doc #19). Respondent's Motion to Hold Proceedings in Abeyance (Doc #21 is denied. Petition for Habeas Corpus relief is granted. Respondents[] are order[ed] to release petitioner immediately subject to reasonable conditions.

DATE	DOCKET NUMBER	PROCEEDINGS
		Signed 10/30/02 by Judge Owen M. Panner. (Related document(s) 19, 21, 1) (cmm) (Entered: 10/30/2002).
11/11/02	25	Motion for Order to Show Cause *(To Enforce Release Order and for Order to the INS to Show Cause Why it Should Not Be Held in Contempt of Court).* Filed by Sergio Suarez Martinez. (Dahl, Christine) (Entered: 11/11/2002)
11/11/02	26	Emergency Motion for Issuance *of the Writ.* Filed by Sergio Suarez Martinez. (Dahl, Christine) (Entered: 11/11/2002)
11/11/02	27	Affidavit of *Dahl & Deffebach.* Filed by Sergio Suarez Martinez. (Related document(s) 25, 26) (Dahl, Christine) (Entered: 11/11/2002)
11/11/02	28	Motion to Strike *$7,500 Bond and Halfway House Condition.* Filed by Sergio Suarez Martinez. (Attachments: #1 Exhibit A #2 Exhibit B (Release Order) #3 Exhibit C (transcript of May

DATE	DOCKET NUMBER	PROCEEDINGS
		3 2000 #4 Exhibit D (Transcript of June 5 2000) #5 Exhibit E (Order Striking Bond) #6 Exhibit F (Mtn Strike in Barrientos) (Dahl, Christine) (Entered: 11/11/2002)
11/12/02	29	**CIVIL MINUTES:** Record of Order—Hearing set for 11/14/2002 at 10:30 AM in Portland. Ordered by Judge Owen M. Panner. (cmm,) (Entered: 11/15/2002)
11/14/02	31	**CIVIL MINUTES:** Record of Hearing: Parties may file Additional Briefing within 5 days. Court will then rule on Petitioner's Emergency Motion for Issuance of Writ (#26), Motion to Enforce Release Order to Show Cause (#25) & Motion to Strike Bond & Halfway House Condition. Ordered by Judge Owen M. Panner. Court Reporter: Paula Tieger. (Kirk) (Entered: 11/22/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
11/20/02	30	Supplemental Memorandum in Support. Filed by Sergio Suarez Martinez. (Attachments: #1 Exhibit F (Sisalao) #2 Exhibit G (Rithy) #3 Exhibit H (Wong) #4 Exhibit I (Aphayavong) #5 Exhibit J (Barrientos Supplemental Memo of Law)) (Related document(s) 25, 26, 28) (Dahl, Christine) (Entered: 11/20/2002)
11/21/02	32	Reply to Motion-*Reply to Petitioners Emergency Motion for Issuance of Writ, Motion for OSC, & Motion to Strike.* Filed by John Ashcroft, Ronald J. Smith. (Related motion(s) 28, 25, 26) (Kirk,) (Entered: 11/22/2002)
11/27/02	33	Notice of *Supplemental Authority.* Filed by Sergio Suarez Martinez. (Attachments: #1) (Dahl, Christine) (Entered: 11/27/2002)
12/30/02	34	Notice of Appeal to USCA from order #24 entered on 10/30/02. Filed by federal respondents Ronald Smith and John Ashcroft. (fh,) (Entered: 01/09/2003)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
1/27/03	38	Docket number 03-35053 as signed by the United States Court of Appeals. USDC Notice of Appeal Doc. #34. (fh,) (Entered: 03/11/2003)
		* * * * *
1/31/03	37	Status Report *REGARDING THE EFFECT OF THE INS'S BOND REQUIREMENT ON THE COURT'S RELEASE ORDER.* Filed by Sergio Suarez Martinez. (Attachments: #1 Exhibit A (INS fax) #2 Exhibit B (correspondence)) (Dahl, Christine) (Entered: 01/31/2003)
4/01/03	39	Notice *Of Mootness of Motion to Strike Bond.* Filed by Sergio Suarez Martinez. (Related document(s) 25, 26, 28) (Dahl, Christine) (Entered: 04/01/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
4/03/03	40	**MINUTE ORDER:** Record of Order: Based on Petitioner's Notice of Mootness of Motion to Strike Bond (#39), Petitioner's Motion for an Order to Show Cause (Related Doc #25), Emergency Motion for Issuance of the Writ (Related Doc #26), and Motion to Strike Bond (Related Doc #28) are WITHDRAWN by Judge Owen M. Panner (Related document(s) 39 (kw,) (Entered: 04/04/2003)
8/20/03	41	Order from Ninth Circuit Court of Appeals: Court summarily affirms the district court['s judgment. USDC Notice of Appeal Doc. #34 and USCA #03-35053 . . . (fh,) (Entered: 09/04/2003)

(3)

MAY 7 2004

No. 03-878

In the Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the continued detention of a criminal alien, who was apprehended at the border of the United States, was denied admission, and was subsequently ordered removed from the United States based on his criminal activities, is lawful, when effectuation of the removal order is not immediately foreseeable.

PARTIES TO THE PROCEEDINGS

Petitioner, Phil Crawford, the Interim Field Office Director in Portland, Oregon, of United States Immigration and Customs Enforcement, is the successor to Ronald J. Smith, District Director, District of Oregon, Immigration and Naturalization Service. John Ashcroft, Attorney General of the United States was named as a habeas corpus respondent below and is also a petitioner here.

Respondent is Sergio Suarez Martinez.

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In the Supreme Court of the United States

No. 03-878

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) is unreported. The order of the district court (Pet. App. 2a) is also unreported.

JURISDICTION

The court of appeals entered its judgment on August 18, 2003. On November 7, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including December 16, 2003, and the petition was filed on that date. The petition for a writ of certiorari was granted on March 1, 2004. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are reproduced in an addendum to this brief.

STATEMENT

The issue in this case is whether aliens, who are stopped at the border, denied admission, and subsequently ordered removed based on their commission of crimes within the United States while on immigration parole, may be detained when their country of origin refuses to accept their return. Such detention is proper because Congress authorized it and a century of constitutional precedent from this Court permits it. Further, a judicially created time limit on detention would interfere significantly with the constitutional responsibility of the political Branches to protect the Nation's borders, manage migration crises, and conduct foreign relations.

1. Statutory Framework

a. Aliens governed by federal immigration law may be grouped into four general categories based on the relative levels of statutory and constitutional protection accorded their interest in residing within the United States. First, aliens who have been lawfully admitted for permanent residence enjoy the greatest statutory and constitutional protection. They generally are entitled to remain in the United States unless they commit certain crimes or engage in other conduct that renders them removable. Second, aliens admitted temporarily as non-immigrants (*e.g.*, students) may remain only for the designated time and purposes of their admission. Third, aliens who have entered illegally and who, therefore, have no statutory claim to remain, nonetheless enjoy some constitutional rights, including a right to due process in any removal proceedings.

Fourth, aliens who have been stopped at the border and are seeking admission in the first instance have no constitutional or statutory entitlement to be admitted or released into the United States. See generally *Zadvydas* v. *Davis*, 533 U.S. 678, 693-694 (2001); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien * * * has been accorded a generous and ascending scale of rights as he increases his identity with our society."). This case concerns the rights of the last group—aliens who have been inspected and denied admission into the United States.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, altered the statutory nomenclature used to refer to the different categories of aliens and the procedures for their return or removal. Previously, aliens who were seeking admission into the United States in the first instance, but were ineligible to enter, were denominated "excludable" aliens and were subject to administrative "exclusion" proceedings. See *Landon* v. *Plasencia*, 459 U.S. 21, 25, 28 (1982); 8 U.S.C. 1182, 1252 (1994). Aliens who already had entered the United States, whether legally or illegally, but were ineligible to remain were referred to as "deportable" aliens subject to "deportation" procedures. See 8 U.S.C. 1227, 1251 (1994). Now, under IIRIRA, the term "inadmissible" alien refers both to excludable aliens and those who have entered illegally. 8 U.S.C. 1182(a)(6). The administrative proceeding conducted to determine whether any alien, whether lawfully admitted or inadmissible, can reside within the United States is now denominated a "removal" proceeding. 8 U.S.C. 1229a. For ease of reference, this brief refers to the subcategory of inadmissible aliens who have been refused admission at the border and whose rights are at issue in this case as "excluded" aliens.

b. The Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, has long afforded the Attorney General or, since March 1, 2003, the Secretary of Homeland Security (Secretary), the discretion to parole into the United States aliens who have been detained at the border and are seeking admission.[1] Such parole may be granted "temporarily under such conditions as [the Attorney General or, now, the Secretary] may prescribe" and only for "urgent humanitarian reasons or significant public benefit." 8 U.S.C. 1182(d)(5)(A); see 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). The Act makes clear, however, that the discretionary "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); see generally *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190 (1958). Section 1182(d)(5)(A) also provides that when, in the opinion of the Attorney General (or, now, the Secretary), the purposes of the alien's immigration parole have been served, the alien shall be returned to custody, "and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. 1182(d)(5)(A).

Congress enacted IIRIRA in 1996 in part to streamline the removal of certain criminal aliens from the United States and to expand the authorization for their detention pending the removal process. To that end, IIRIRA, as amended, requires the Secretary to detain aliens who have committed specified crimes before, during, and for a certain time after a decision regarding their removability. See 8 U.S.C. 1226, 1231; see generally *Demore* v. *Kim*, 538 U.S. 510 (2003). Af-

[1] On March 1, 2003, the functions of several border and security agencies, including those of the former Immigration and Naturalization Service, were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)).

ter an order requiring the removal of an alien becomes final, IIRIRA directs the Secretary to remove the alien from the United States within 90 days and to continue detention of criminal aliens during that removal period. 8 U.S.C. 1231(a)(1)(A) and (2). If the Secretary is unable to effect the removal within that 90-day period, IIRIRA provides:

> An alien ordered removed who is inadmissible under section 1182 of this title [*i.e.*, aliens who are statutorily ineligible for admission due, *inter alia*, to the commission of crimes], removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) [*i.e.*, aliens who, subsequent to entry, violate their status or conditions of entry, commit specified crimes, or pose a security threat] of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

8 U.S.C. 1231(a)(6). When Congress enacted Section 1231 in 1996, it left unamended the longstanding discretionary authority of the Attorney General under Section 1182(d)(5)(A) to parole, to decline to parole, and to revoke the parole, of aliens seeking admission to the United States.

c. While the vast majority of excluded aliens can be removed within or shortly after the 90-day window prescribed by Section 1231(a), the dynamic and fluid nature of foreign relations, as well as political developments in the countries to which aliens are to be removed, sometimes delay removals. In order to minimize the detention of aliens stopped at the border, including those who are subject to a formal order of exclusion or removal but whose removal has been delayed, the Attorney General promulgated regulations (which the Secretary now administers and enforces) governing the release on parole of such aliens. 8 C.F.R. 212.5, 241.4. Those regulations largely mirror the framework developed by the

Attorney General in 1987 under his Section 1182(d)(5)(A) parole authority to govern the detention and release of Mariel Cubans (*i.e.*, any Cuban who came to the United States between April 15, 1980, and October 20, 1980). 8 C.F.R. 212.12; see also 52 Fed. Reg. 48,802 (1987).

Under those regulations, an alien may be paroled if he demonstrates that he "(i) is presently a nonviolent person; (ii) * * * is likely to remain nonviolent; (iii) * * * is not likely to pose a threat to the community following his release; and (iv) * * * is not likely to violate the conditions of his parole." 8 C.F.R. 212.12(d)(2); see 8 C.F.R. 212.5, 241.4(d)(1), (e) and (f)(8). The parole determination includes a review of the alien's administrative file, detention record, history of cooperation with removal efforts, and any statement submitted by the alien. 8 C.F.R. 212.12(d)(4), 241.4(g)(5) and (h)(1) (as amended by 67 Fed. Reg. 39,259 (2002)). For Mariel Cubans, parole may not be denied without the alien being personally interviewed. 8 C.F.R. 212.12(d)(4)(ii). For all other aliens, such an interview is discretionary. 8 C.F.R. 241.4(h)(1) (as amended by 67 Fed. Reg. at 39,259). Aliens are provided notice that a parole decision will be made and may be assisted by a person of their choice in preparing submissions. 8 C.F.R. 212.12(d)(4)(ii), 241.4(h)(2) (as amended by 67 Fed. Reg. at 39,259). A written parole decision is issued. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5). Parole reviews for detained aliens are conducted at least annually, with provision made for interim parole decisions based on changed circumstances. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(iii).

If the alien is granted parole, the Secretary may impose conditions and restrictions on the alien. 8 C.F.R. 212.12(f), 241.4(j), 241.5. Parole may be revoked if, among other things, the parolee violates the conditions of parole, repatriation becomes possible, or the purposes of parole have been served. 8 C.F.R. 212.12(h), 241.4(*l*).

2. Factual Background

a. Respondent is one of approximately 125,000 Cuban nationals, many with criminal records in Cuba, who were stopped and denied admission as they attempted to enter the United States illegally during the 1980 Mariel boatlift. Pet. 2; see *Fernandez-Roque* v. *Smith*, 734 F.2d 576, 578 (11th Cir. 1984); *Palma* v. *Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982). Because the Mariel Cubans had arrived in ramshackle boats and makeshift rafts, the government concluded that forcing them to remain at sea or to sail in another direction could have imperiled their lives or physical safety. *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 898 (N.D. Ga. 1985). When the government of Cuba refused to accept its nationals back, the Attorney General exercised his discretionary authority to parole most of those Cubans, including respondents, into the United States. See 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980); *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1439 (5th Cir.), as amended, 997 F.2d 1122 (1993); *Fernandez-Roque*, 734 F.2d at 579; *Palma*, 676 F.2d at 102.[2]

Federal law permitted Cubans who were paroled into the United States to adjust their status to that of lawful permanent resident after one year. See Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161, as amended

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[2] The government's humanitarian actions were acompanied by clear warnings that "exclusion proceedings will also be started against those who have violated American law while waiting to be reprocessed or relocated." See *Fernandez-Roque* v. *Smith*, 622 F. Supp. 887, 894 (N.D. Ga. 1985) (quoting White House statement of June 7, 1980); see also *id.* at 899. In 1981, when Cuba's refusal to allow repatriation created the possibility of prolonged detention for the small number of Cuban aliens who were not initially paroled because of their criminal backgrounds or serious medical and psychiatric problems, the Attorney General adopted a special Status Review Plan for Mariel Cubans. See generally *Fernandez-Roque*, 734 F.2d at 579. That Plan resulted in the parole of 2040 more Mariel Cubans.

(reproduced at 8 U.S.C. 1255 note). However, Cuban aliens who engaged in serious criminal activity were not eligible for adjustment of status. See *ibid.* (applicant must be "admissible to the United States for permanent residence").[3]

All Mariel Cubans were released on parole at some point after they arrived at the border. The vast majority either remain on parole or have had their status adjusted to that of lawful permanent resident. Approximately 750 Mariel Cubans (including respondent) are currently in immigration custody, after having their parole revoked, and have been held for more than six months.[4] Since 1987, the Immigration and Naturalization Service (INS), as succeeded by the Department of Homeland Security, has granted parole to Mariel Cubans who were previously in immigration custody approximately 9206 times. Nearly half—approximately 4020—of those paroles were revoked because of subsequent criminal activity in the United States.

b. The United States has consistently maintained that Cuba is required, as a matter of international law, to take back all of its nationals denied admission to the United States. See 8 U.S.C. 1522(f)(5). To that end, the United States has been engaged since the 1980s in ongoing discussions with the Cuban government for the return of excluded Mariel Cubans. In 1984, the United States and Cuba reached an accord on immigration and repatriation that, *inter alia*, called for the return to Cuba of 2746 specified individuals with serious criminal backgrounds or mental

[3] See also 8 U.S.C. 1182(a)(9) (1982); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 202(a)(3), 100 Stat. 3404 (disqualifying Mariel Cubans convicted of serious crimes); 8 U.S.C. 1255a(a)(4); *Benitez v. Wallis*, 337 F.3d 1289, 1290 n.2 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434).

[4] The approximate number of excluded aliens of all nationalities who have been held in custody for more than six months is 1058. Approximately 15,000 aliens are on parole.

infirmities. See Immigration Joint Communique Between the United States and Cuba, Dec. 14, 1984, T.I.A.S. No. 11,057. Since that accord, the process of returning excluded aliens to Cuba has been halting, and discussions with the Cuban government on the full range of migration issues have stopped and restarted a number of times. See 52 Fed. Reg. 48,799 (1987); *Gisbert*, 988 F.2d at 1439 n.4; *In re Barrera*, 19 I. & N. Dec. 837 (BIA 1989). Approximately 1672 Mariel Cubans have been repatriated under that accord, with the most recent repatriations occurring in April 2004.[5]

c. Respondent arrived in Florida in June 1980, was apprehended at the border, and was detained by the INS. Later that month, the INS granted respondent temporary immigration parole, pursuant to 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980). See Pet. 7; Gov't C.A. Resp. to Mot. for Summ. Affirmance (Gov't C.A. Resp.) 3. The law authorizing parole provided then (as it does now, see 8 U.S.C. 1182(d)(5)(A)) that "parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5) (1976); 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980).

In March 1983, respondent pled guilty in Rhode Island to assault with a deadly weapon and was sentenced to six months' imprisonment and three years of probation. Pet. 7; Gov't C.A. Resp. 3. In January 1984, respondent was convicted in California of burglary and was sentenced to five years' probation. *Ibid.* In January 1991, respondent applied for adjustment of his status to that of a lawful permanent resident. That application was denied based on respondent's criminal conduct within the United States. Gov't D. Ct. Mot.

[5] The United States recently suspended the periodic bilateral discussions because of the Cuban government's refusal to discuss migration issues seriously, including the repatriation of Cuban nationals. The existing migration accords between the two countries remain in effect, however, and the repatriation of some excluded criminal aliens to Cuba is continuing.

for Continuance to Answer Habeas Corpus Pet. (Gov't D. Ct. Mot.) 3.

In October 1996, respondent was convicted in California of petty theft with priors and was sentenced to three years' imprisonment. Gov't D. Ct. Supp. Mot to Hold in Abeyance (Gov't D. Ct. Supp. Mot.) 3. In July 1998, he was convicted in California of assault with a deadly weapon and was sentenced to three years' imprisonment. *Ibid.*; Gov't C.A. Resp. 3. One year later, respondent was convicted in California of attempted oral copulation by force and was sentenced to two years in prison. *Ibid.*

In December 2000, the INS revoked respondent's parole, took him into custody, and initiated removal proceedings against him based on his criminal convictions. Gov't C.A. Resp. 3-4; Gov't D. Ct. Mot. 3. In January 2001, an immigration judge determined that respondent is inadmissible and ordered him removed to Cuba. Gov't C.A. Resp. 4. Respondent did not appeal that order. *Ibid.*

Pursuant to the parole regulations governing Mariel Cubans, the INS evaluated respondent for parole in May 2001 and March 2002. Gov't C.A. Resp. 4. Both times, following an interview and review of the file, the INS Associate Commissioner for Enforcement determined that parole was not warranted because of respondent's propensity to engage in recidivist criminal behavior and his inability to accept responsibility for his criminal acts. *Ibid.*[6]

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[6] There are five other cases currently pending before this Court presenting the same question that this case does. In *Benitez* v. *Mata*, No. 03-7434 (consolidated for argument with the instant case), Benitez had his parole revoked after being convicted of grand theft, armed burglary, armed robbery, aggravated battery, unlawful possession of a firearm while engaged in a crime, carrying a concealed weapon, and unlawful possession, sale, or delivery of a firearm. 03-7434 Pet. App. at 2a-4a. In *Perez-Aquillar* v. *Ashcroft*, No. 03-8075, Perez-Aquillar repeatedly committed sexual crimes against children and was arrested for possession of a controlled substance while on parole. 03-8075 Resp. Br. at 4. In *Crawford* v. *Riveron-Aguilera*, No. 03-1265, Riveron-Aguilera committed aggravated criminal sexual assault, rape with a gun, robbery, kidnaping, and possession of controlled substances while on parole. 03-1265 Pet. at 4-5. In *Alcanter* v. *Pedroso*, No. 03-1436, Pedroso was convicted while on parole of carrying a concealed weapon, second degree burglary, battery with corporal injury, exhibiting a deadly weapon, vandalism, corporal injury, and threats with intent to terrorize. 03-1436 Pet. at 5. In *Sierra* v. *Ashcroft*, No. 03-8662, Sierra committed "a series of serious criminal acts" while on parole, including carrying a deadly weapon, theft, and breaking and entering. 03-8662 Pet. App. at 4a.

3. Procedural History

In July 2002, respondent filed a habeas corpus petition, under 28 U.S.C. 2241, in the United States District Court for the District of Oregon. Pet. App. 3a. On October 30, 2002, the district court granted the petition in a one-page order without opinion, and ordered respondent released from custody under supervisory conditions. *Id.* at 2a. Petitioners released respondent pursuant to that order on March 31, 2003.

The court of appeals summarily affirmed based on its earlier decision in *Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002). Pet. App. 1a. In *Xi*, a divided panel of the Ninth Circuit held that the presumptive six-month cap on the detention of lawful permanent residents adopted by this Court in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), should be extended to excluded criminal aliens. The court emphasized that the text of 8 U.S.C. 1231(a)(6) draws no distinction between excluded aliens and those who have gained entry, and thus concluded that the two groups must be treated identically under *Zadvydas*. 298 F.3d at 836-839. The court acknowledged that this Court's opinion in *Zadvydas* expressly reserved the question of whether excluded aliens could be detained, but found no authority "suggesting that a litigant may not take advantage of a statutory interpretation that

was guided by the principle of constitutional avoidance when that litigant's case does not present the constitutional problem that prompted the statutory interpretation." *Id.* at 839.

SUMMARY OF ARGUMENT

Respondent's continued detention is lawful because he has never been formally admitted into the United States, and a century of precedent and practice make clear that there is nothing legally or constitutionally questionable about excluding aliens, even for life, from entry into the United States. Indeed, the power to exclude aliens is an essential attribute of the United States' sovereignty, to be exercised exclusively by the Executive Branch and Congress. The detention of respondent is the only means by which the United States can enforce exclusion when foreign governments turn their backs on their own citizens.

Respondent claims a statutory and constitutional right to be paroled into the United States, rather than detained. No such right exists. The Attorney General granted respondent and the other excluded aliens whose cases are pending before this Court parole upon their arrival as a humanitarian gesture, rather than leaving them to drown or die of dehydration in the open seas. The United States Government went even further and offered the aliens the opportunity to become lawful permanent residents. Respondent and the other aliens responded to those offers by committing crime after crime within this country.

In respondent's view, the United States government has not been generous enough, and he insists that he has a right to be released, notwithstanding any express determination by the government that he poses a risk to the public. But Congress expressly provided in IIRIRA that such inadmissable and criminal aliens "may be detained" even after the removal period has passed, 8 U.S.C. 1231(a)(6), and

Congress left unaffected the discretionary authority of the Attorney General under 8 U.S.C. 1182(d)(5)(A) to either grant or deny parole to aliens stopped at the border and to revoke the parole of such aliens after they have been released. Nothing in those statutory provisions or in constitutional principles vests excluded criminal aliens with an entitlement to rejoin the communities they have already victimized. Nor does this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), require such a result. *Zadvydas* held only that there is a presumptive six-month cap on detentions for aliens who previously had been granted lawful permanent resident status, because their ongoing detention raised substantial constitutional concerns. The ongoing *exclusion* of aliens who have never been admitted to the United States and whose own recidivist criminal behavior has divested them of the opportunities for residence or parole offered by the government raises no similar constitutional concerns.

Finally, the foreign policy and national security concerns that the Court considered to be absent in *Zadvydas* would be squarely joined were the courts to compel the release into this country of aliens that the political Branches have together determined should be excluded. Such a ruling would provide an open channel for foreign governments to thrust their unwanted citizens and dangerous individuals into American society. It blinks reality to read into Congress's express authorization for the Executive Branch to *detain* excluded criminal aliens a sea change in those aliens' liberty interests or an intent to render the United States more vulnerable to the insinuation of dangerous individuals or other forms of manipulation by foreign powers.

ARGUMENT

SECTION 1231(A)(6) OF TITLE 8 PERMITS THE CONTINUED EXCLUSION, THROUGH DETENTION BEYOND THE STATUTORY REMOVAL PERIOD, OF CRIMINAL ALIENS WHO HAVE NOT BEEN ADMITTED TO THE UNITED STATES AND WHO CANNOT BE IMMEDIATELY REMOVED

Section 1231(a)(6) of Title 8 expressly authorizes the Secretary to "detain[] beyond the removal period" aliens whose removal cannot be effected within the statutory 90-day removal window. With respect to excluded criminal aliens, the statute should be construed to mean exactly what it says and to permit their continued detention, even when removal is not immediately foreseeable. That is because aliens stopped at the border and then formally ordered to be excluded have never enjoyed any statutory or constitutionally recognized liberty interest in release into the United States. Recidivist criminal aliens like respondent and the other excluded aliens whose cases are pending, see note 6, *supra*, are particularly ill-positioned to ask this Court to read into a *detention* statute a novel liberty interest that entitles them, despite their criminal histories, to be released into the United States over the express objection of the Executive Branch. Furthermore, continued detention is the only practicable means of effectuating the government's legitimate and enduring interest in excluding such aliens from American society.

A. Aliens Stopped At The Border And Denied Admission Lack Any Protected Liberty Interest In Release Into The United States

1. *The Executive and Legislative Branches Have Comprehensive Control Over Immigration*

For more than a century, this Court has repeatedly emphasized that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); see *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889). That is because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952)). This case is illustrative—Cuba provides a "dramatic example of bending immigration policy to meet a United States foreign policy objective." Fla. Immig. Br. 10 (quoting David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* 16 (1997)). The judiciary is "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of those foreign policy objectives or the political Branches' implementation of them through the admission or removal of particular aliens. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999). For that reason, "[s]uch matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. at 589; see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deference on immigration matters is "especially appropriate" because "officials 'exercise especially sensitive political functions that implicate

questions of foreign relations'") (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 711 (1893). Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892); see *Ping*, 130 U.S. at 603-604 ("Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence."). That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972). The power to exclude is a legislative and an "inherent executive" power. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).

2. *The Executive and Legislative Branches Have Plenary Control Over Aliens at the Border*

The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States:

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for

> the power to admit or exclude aliens is a sovereign prerogative. * * * Our recent decisions confirm that view. * * * [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.

Landon v. *Plasencia*, 459 U.S. 21, 32 (1982); see also *United States* v. *Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) ("The Government's interest in preventing the entry of unwanted persons * * * is at its zenith at the international border."). That legal "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693.[7] And with respect to excluded aliens, "the Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has for-

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[7] See also *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 175 (1993) ("[O]ur immigration laws have long made a distinction between those aliens who have come to our shores seeking admission * * * and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category."); *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (rights and privileges accorded resident aliens are denied to those merely "on the threshold of initial entry"); *Mezei*, 345 U.S. at 212 ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"; "[b]ut an alien on the threshold of initial entry stands on a different footing"); *Knauff*, 338 U.S. at 543 ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien."); *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925) (an "excluded" alien was "still in theory of law at the boundary line and had gained no foothold in the United States").

bidden." *Mandel*, 408 U.S. at 766 (internal quotations omitted).

That distinction between the rights and protections accorded aliens stopped at the border and those who have been admitted by our government is one of constitutional magnitude:

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Kwong Hai Chew v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); see *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").[8]

More particularly, this Court has "long held" that aliens stopped at the border have no constitutionally protected liberty interest in release into the United States. *Plasencia*, 459 U.S. at 32. "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Ibid.*; see *Mezei*, 345 U.S. at 210 ("[N]o alien so situated 'can force us to admit

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[8] See *Plyler* v. *Doe*, 457 U.S. 202, 212-213 n.12 (1982) (Court's equal protection ruling did not encompass excluded aliens, due to "the long-standing distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings"); *Mandel*, 408 U.S. at 762, 768-770; *United States* v. *Ju Toy*, 198 U.S. 253, 263 (1905); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904) (excluded alien does not enjoy First Amendment protections: "[T]hose who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.").

him at all.'") (quoting *Mezei*, 195 F.2d 964, 970 (2d Cir. 1952) (Learned Hand, J., dissenting)). In fact, this Court's decision in *Mezei* flatly rejected the identical liberty interest asserted by respondent here. Mezei was stopped at the border and ordered excluded, but no other country would accept him. As this Court described it, "[t]he issue [was] whether the Attorney General's continued exclusion" of Mezei "amount[ed] to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad." 345 U.S. at 207. The Court held that Mezei enjoyed only those protections that the political Branches chose to afford him. "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 212 (quoting *Knauff*, 338 U.S. at 544). Thus, as this Court recently reaffirmed in *Zadvydas*, in analyzing an alien's interest in being free from detention, his status as an excluded alien will "ma[k]e all the difference." 533 U.S. at 693; see also *Ekiu*, 142 U.S. at 659-660.[9]

That constitutional distinction rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-

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[9] Efforts to distinguish *Mezei* as a national security case, see *Rosales-Garcia* v. *Holland*, 322 F.3d 386, 413-414 (6th Cir.), cert. denied, 123 S. Ct. 2607 (2003), are misplaced. Although the Court referred to national security concerns in explaining why *Congress* might have chosen to exclude aliens like Mezei, the Court's holding concerning the constitutionality of his continued detention was categorical: "[Mezei's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." 345 U.S. at 216. Moreover, this Court rejected a similar effort to distinguish prior immigration cases on national security grounds in *Fiallo*, finding "no indication in our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue." 430 U.S. at 796.

powers considerations in this sensitive area where foreign policy and national security intersect. When an individual is formally admitted to the United States, a court's recognition and protection of a liberty interest does not *cause* the entry. The court's role (*e.g.*, in *Zadvydas*) simply delineates the *consequences*, statutory and constitutional, of an entry that has already been authorized by the political Branches and has been accomplished without judicial intervention. By contrast, when the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never * * * even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches." *Ekiu*, 142 U.S. at 660; see *Knauff*, 338 U.S. at 543; *Yamataya* v. *Fisher*, 189 U.S. 86, 98 (1903).[10]

[10] Efforts to cast doubt on *Mezei* by noting the additional process afforded aliens in *Chin Yow* v. *United States*, 208 U.S. 8 (1908), and *Kwock Jan Fat* v. *White*, 253 U.S. 454 (1920)—cases decided prior to *Mezei*—are to no avail. The narrow question presented in those cases "was whether the petitioner was a citizen of the United States before he sought admission." *Tod* v. *Waldman*, 266 U.S. 113, 119 (1924), as modified, 266 U.S. 547 (1925).

3. *Parole Does Not Enhance An Excluded Alien's Rights*

The political Branches' control over excluded aliens does not diminish, nor do the rights of the aliens increase, just because they have been paroled into the United States, for two reasons.

First, this Court has repeatedly ruled that the Executive Branch's discretionary parole of an excluded alien does "not alter her status as an excluded alien or otherwise bring her 'within the United States.'" *Leng May Ma* v. *Barber*, 357 U.S. 185, 186 (1958).[11] Indeed, Congress has expressly provided in current law, as it has historically done, that the discretionary parole of an alien "shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A); accord 8 U.S.C. 1101(a)(13)(B). Thus, today, just as in 1958, any argument that the constitutional balance changes due to "the effect of parole certainly finds no support in this statutory language." *Leng May Ma*, 357 U.S. at 188. Quite the opposite, to attach such legal consequences to parole would defy duly enacted statutory text, congressional design, more than a century of consistent precedent, and—importantly—the explicit conditions and understandings on which the Attorney General originally granted respondent and thousands of other aliens discretionary parole.

[11] See also *Sale*, 509 U.S. at 159 (those "temporarily paroled" remain subject to exclusion proceedings); *Mezei*, 345 U.S. at 215 ("But such temporary harborage, an act of legislative grace, bestows no additional rights."); *Rogers* v. *Quan*, 357 U.S. 193, 195 (1958); *Kaplan*, 267 U.S. at 230 (nine-year parole of alien did not alter "the nature of her stay within the territory * * *. She was still in theory of law at the boundary line and had gained no foothold in the United States."); *Ekiu*, 142 U.S. at 661 ("Putting her in the mission house, as a more suitable place than the steamship, * * * left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship.").

Second, attaching any such legal consequences to a grant of parole would misapprehend the nature of parole. The purpose of parole is not to give excluded aliens enhanced legal protections. *Leng May Ma*, 357 U.S. at 190 (parole "was never intended to affect an alien's status"). Rather, "[p]arole is an act of extraordinary sovereign generosity" because it "grants temporary admission" into the United States "to an alien who has no legal right to enter and who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." *Jean* v. *Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Parole thus "is simply a device through which needless confinement is avoided while administrative proceedings are conducted" and while removal is effectuated. *Id.* at 969 (quoting *Leng May Ma*, 357 U.S. at 190). Furthermore, when masses of aliens flood the border, arriving under conditions in which their physical exclusion or forced return would imperil their lives, parole allows the United States to respond to that crisis and to manage the foreign relations implications of the influx in a decent, civilized, and humane manner. *Ibid.*; U.S. Comm'n on Immigration Reform, *Legal Immigration: Setting Priorities* 157 (1995) ("Parole also provides great flexibility to the executive branch to respond to humanitarian and foreign policy situations."); see 8 U.S.C. 1182(d)(5)(A) (allowing parole for "urgent humanitarian reasons").

Because parole does not alter the alien's legal status, the government is able to exercise such compassion and protect the short-term safety of aliens who have arrived at our shores without endangering the government's ability, in the long run, to ensure the safety and security of the American public by returning the aliens to physical custody if necessary to protect society. See 52 Fed. Reg. at 48,799 (use of parole in Mariel Cuban crisis balanced individual and public interests). If, however, new legal consequences were

to attach to the parole decision, that calculus would change. The inevitable, practical consequence of granting parole would be to restrict the government's ability to prevent dangerous aliens from circulating through American society. It would also reward the foreign powers that generate such humanitarian crises by signaling to them that mass migrations weaken Congress's and the President's control over the borders and facilitates the infiltration of dangerous individuals onto American streets.[12] Respondent's position, in short, would restrict the President's and Congress's flexibility in responding to humanitarian migration emergencies by forcing them to choose, during the heat of the crisis, between the immediate physical safety and security of the aliens and the long-term safety and security of the American public. That position may well prove more harm than help to aliens. See *Leng May Ma*, 357 U.S. at 190 (treating parole as altering the excluded alien's legal status "would be quite likely to prompt some curtailment of current parole policy"). Thus, at bottom, respondent's position would have this Court adopt, in the asserted interest of fairness and liberty for those few excluded criminal aliens who already have proven themselves least deserving of release into free society, a conception of parole that weights the scales in favor of mass and prolonged detention for *all* arriving aliens at the border. It is hard to see the fairness in that approach.

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[12] See *Ping*, 130 U.S. at 604 ("If [a nation] could not exclude aliens it would be to that extent subject to the control of another power."); *Rosales-Garcia*, 322 F.3d at 419 (Boggs, J., dissenting) (criticizing the majority's holding extending *Zadvydas* to excluded aliens because, if "hundreds of thousands" of non-removable aliens "present themselves at our borders, * * * the government of the United States is constitutionally disabled from doing anything, after a short interval, other than set all such persons at liberty in our country").

It is true that, when parole is prolonged, the alien may develop substantial ties to the community. But "[w]e doubt that the Congress intended the mere fact of delay to improve an alien's status from that of one seeking admission to that of one legally considered within the United States." *Rogers*, 357 U.S. at 196. If the alien develops ties, he does so with the full knowledge that his release on parole is temporary and conditional. *Harisiades*, 342 U.S. at 586-587 ("[T]o protract this ambiguous status within the country is not his right but is a matter of permission and tolerance."). Congress, moreover, has provided other mechanisms for dealing with such assimilation, chiefly the opportunity provided to Mariel Cubans to adjust their status to that of lawful permanent resident. See 8 U.S.C. 1255 note.

Beyond that, this case and the others pending before the Court are not about paroled aliens who established stable and law-abiding lives in the United States. Those individuals are not being detained. Rather, this case is about aliens who have spent a significant portion of their time in the United States in the American criminal justice system. The fact is that the government offered respondent the keys to the liberty he now seeks, through his first parole and the opportunity to adjust his status. He threw those keys away. The same self-chosen behavior that caused his parole to be revoked and rendered him ineligible for adjustment of status leaves him ill-positioned to claim some sort of reliance interest in his community ties.

B. The Text, Structure, And History of Section 1231(a)(6) Confirm The Executive Branch's Authority To Detain Excluded Criminal Aliens

1. *The Statutory Text and Structure Support the Secretary's Detention Authority*

In providing, in 8 U.S.C. 1231(a)(6), that excluded aliens "may be detained beyond the removal period," Congress

acted against the long-established background principle—which was voiced with particular clarity in *Mezei* and *Leng May Ma*—that excluded aliens have no liberty interest in being released into the United States and that their release on parole is committed to the discretion of the Executive. Nothing in the text of Section 1231(a)(6), which affirmatively *authorizes* detention, supports the court of appeals' contraction of the Executive Branch's historic authority to detain aliens stopped at the border. To the contrary, the language "suggests discretion," and "literally" sets no time limit on the detention of excluded aliens who cannot be removed. *Zadvydas*, 533 U.S. at 689, 697.

The overall structure of IIRIRA reinforces the Executive Branch's power to detain excluded aliens beyond the removal period. As an initial matter, it would be particularly inappropriate to read into Section 1231(a)(6) a "drastic expansion of the rights of inadmissible aliens," *Benitez* v. *Wallis*, 337 F.3d 1289, 1300 (11th Cir. 2003), cert. granted, 124 S. Ct. 1143 (2004) (No. 03-7434), in the face of Congress's express statutory directive that Section 1231 not be construed to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. 1231(h). Furthermore, at the same time that it enacted Section 1231(a)(6), Congress adjusted the rights of aliens who had entered the United States both legally and illegally. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 107 (1997). With respect to aliens stopped at the border, Congress retained and strengthened the statutory restrictions. Congress, for example, preserved the Attorney General's (now the Secretary's) discretion to detain or parole such aliens into the United States, including both during their removal proceedings and pending their physical removal, compare 8 U.S.C. 1182(d)(5)(A), 1226(e)(1) and (3) (1994), with 8 U.S.C. 1182(d)(5)(A), 1225(b)(1)(B)(iii) (IV), 1226(c)(1)(A), 1231(a)(6) (2000), and continued to provide that parole is not an

admission and remains discretionary, temporary, conditional, and subject to revocation, compare 8 U.S.C. 1182(d)(5)(A) (1994), with 8 U.S.C. 1101(a)(13), 1182(d)(5)(A) (2000).[13]

That retention of the Executive's discretionary parole authority, 8 U.S.C. 1182(d)(5)(A), is particularly instructive. That provision allows the Secretary, "in his discretion," to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." The tenor of that Section indicates that Congress expected the parole of excluded aliens to be an exceptional act of grace. See *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1446 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995); *Amanullah* v. *Nelson*, 811 F.2d 1, 6 (1st Cir. 1987). Further, a necessary concomitant of that discretionary authority to grant parole is the parallel authority *not* to parole—and instead to detain—aliens stopped at the border. Accordingly, the Secretary's authority to detain excluded aliens pending their removal has its roots not only in Section 1231(a)(6), but also in Section 1182(d)(5)(A). The court of appeals' holding that Section 1231(a)(6) should be read to make mandatory for those criminal aliens who abused their parole privilege and became subject to final orders of removal the very release on parole that Section 1182(d)(5)(A) expressly makes exceptional and discretionary for *all* aliens who were stopped

[13] Congress also (i) carried forward the provisions delineating which classes of aliens cannot be admitted to the United States, compare 8 U.S.C. 1182(a) (1994), with 8 U.S.C. 1182(a) (2000 & Supp. I 2001); (ii) again directed the Attorney General to detain such aliens on arrival pending their exclusion or removal proceedings, compare 8 U.S.C. 1225(b), 1226 (1994), with 8 U.S.C. 1225(b)(1)-(3), 1226(c)(1)(A) (2000); and (iii) reiterated the mandate that the Attorney General promptly remove aliens ordered excluded, compare 8 U.S.C. 1227(a)(1) and (2) (1994), with 8 U.S.C. 1231(b)(1) and (c) (2000).

at the border and denied admission turns the congressional design on its head.

The court of appeals reasoned (*Xi* v. *INS*, 298 F.3d 832, 835-839 (9th Cir. 2002), that, having already been construed in *Zadvydas* to impose a presumptive six-month cap on detentions, the text of Section 1231(a)(6) cannot draw any distinction based on the alien's status. This Court certainly thought otherwise in *Zadvydas*. If an alien's status were irrelevant, there would have been no point to opening the opinion with the reservation that "[a]liens who have not yet gained initial admission to this country would present a very different question" (533 U.S. at 682), and then devoting two full pages of the opinion (*id.* at 693-694) to discussing what was twice described as the "critical" distinction (*ibid.*) between excluded aliens and those already present in the United States. Nor would the Court have eschewed "consider[ing] the political branches' authority to control entry into the United States." *Id.* at 695. Furthermore, the Secretary's authority to detain excluded aliens derives not just from Section 1231(a)(6), but also from Section 1182(d)(5)(A)'s general parole authority for excluded aliens. That distinct authority was not implicated in *Zadvydas*. But in this case, the two statutory provisions must be read *in pari materia*.

Furthermore, the court of appeals overlooked that the statutory language construed in *Zadvydas* was the word "may" in the phrase "may be detained," 533 U.S. at 697. That language, under *Zadvydas*, authorizes detention until it approaches constitutional limits. In addition, "may" is not the type of word that bespeaks a single, uniform, and unbending application across statutorily and constitutionally divergent applications. To the contrary, it suggests flexibility and discretion to adapt to different contexts. Thus nothing in the statutory text precludes recognition that the detention authority varies in scope based on circumstances.

The court of appeals suggested (*Xi*, 298 F.3d at 835-836) that it would be unusual to have the meaning of the same words change based on the characteristics of the individual before the Court. That cannot be right. The scope of the protection afforded by the Due Process Clause of the Fifth Amendment—the constitutional fount of the very liberty interest that respondent claims—routinely turns upon the background or characteristics of the individual, such as membership in a class afforded special protection, see, *e.g.*, *Miller* v. *Albright*, 523 U.S. 420 (1998), or, in the case of aliens, whether they are inside or outside the United States, see *Zadvydas*, 533 U.S. at 693; *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). Respondent, as an alien stopped at the border, is in the latter category.

Indeed, this would not be the first time, in the field of immigration law, that legal status and rights would vary depending upon the categorization of an alien. "[I]t is 'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, [and] * * * to 'take into account the character of the relationship between the alien and this country.'" *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) (quoting *Diaz*, 426 U.S. at 80, 85). In *Zadvydas* itself, the Court acknowledged that the detention authority might differ in cases involving "terrorism or other special circumstances." 533 U.S. at 696. In *Reno* v. *Flores*, 507 U.S. 292 (1993), the same words in a single statutory provision that, like Section 1231(a)(6), provided that the Attorney General "may" detain an alien, see 8 U.S.C. 1252(a)(1) (1988), supported different applications for juvenile aliens and adults. Indeed, the court of appeals presumably would agree that Section 1231(a)(6)'s presumptive cap on the detention of resident aliens would tolerate the lengthier detention of a juvenile if there were no appropriate sponsor. At bottom, then, the court of appeals decision reflected not so much "fidelity" to statutory uniformity, *Xi*, 298 F.3d at 836, as a selective opposition to any variations in the Secretary's detention authority that are adverse to this particular respondent's situation.

Nor would it be unprecedented for this Court to construe the same words of a statute one way for constitutional reasons and another way when those same constitutional constraints do not apply. *Crowell* v. *Benson*, 285 U.S. 22 (1932), did exactly that. There, the Court construed statutory language that provided a commission "'full power and authority to hear and determine all questions.'" *Id.* at 62. In light of what the Court regarded as the substantial constitutional question that would arise if the quoted language precluded judicial review of jurisdictional facts, the Court construed the language to permit review of those facts, even though the same statutory language continued to limit or preclude judicial review of facts pertaining to, *e.g.*, the employees' injuries. *Id.* at 46, 54, 62.[14] The court of appeals' insistence on the wooden extension of the result in *Zadvydas* to the critically different context of excluded aliens thus cannot be justified as the ineluctable byproduct of past practice.[15]

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[14] See also *Xi*, 298 F.3d at 841 (Rymer, J., dissenting); cf. *Lane* v. *Pena*, 518 U.S. 187, 196-197 (1996) (statutory language that permits monetary damages against municipal defendants and others does not permit monetary damages against the federal government).

[15] The court of appeals emphasized (*Xi*, 298 F.3d at 836) Justice Kennedy's comment in his *Zadvydas* dissent (see 533 U.S. at 710), that construing Section 1231(a)(6) to operate differently for excluded aliens is not "plausible." But Justice Kennedy also considered any argument that the *Zadvydas* holding embraces excluded aliens—the very holding of the court of appeals here—to be equally unsustainable. *Ibid.* Beyond that, Justice Kennedy's "comments in [his] dissenting opinion * * * are just that: comments in a dissenting opinion." *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980).

2. *The Legislative History Supports the Secretary's Detention Authority*

The history of IIRIRA's enactment documents that Congress was legislating exactly contrary to the court of appeals' supposition that the authority to detain excluded aliens was narrowed and capped. Congress enacted IIRIRA, not to enhance the rights of excluded aliens, but to combat the growing problem of criminal recidivism by aliens and to diminish the rights of aliens who have illegally entered the country. Underlying IIRIRA was Congress's recognition that "[c]riminal aliens cost our criminal justice systems hundreds of millions of dollars annually and are generally perceived to be a serious and growing threat to public safety." GAO, *Criminal Aliens: INS' Efforts to Identify and Remove Imprisoned Aliens Need to Be Improved* 3 (July 15, 1997) (explaining impetus for 1996 legislation); see U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 153 (1994) ("[T]he top priority of enforcement strategies should be the removal of criminal aliens from the U.S."). One of IIRIRA's sponsors stressed that "[r]ecidivism rates for criminal aliens are high," citing a General Accounting Office study that found that "77 percent of noncitizens convicted of felonies are arrested at least one more time." 142 Cong. Rec. 7972 (1996).[16]

In June 1995, the House of Representatives considered a bill, H.R. 1915, designed to improve the "removal of illegal and criminal aliens." H.R. Rep. No. 879, 104th Cong., 2d Sess. 105 (1997). That bill proposed "more stringent standards for the release of aliens (particularly aliens convicted of aggravated felonies) during and after removal proceedings." H.R. 1915, 104th Cong., 1st Sess. § 300(3), at 36 (1995). The bill specifically provided that, upon expiration of the removal period, excluded aliens could be continued in detention. *Id.* § 305(3), at 83-84 ("An alien ordered removed who is inadmissible under section [1182] may be detained beyond the removal period and, if released, shall be subject to [statutory] terms of supervision."). That bill was aimed at "increas[ing] detention of aliens who are ordered removed." H.R. Rep. No. 879, *supra*, at 108.

The detention provisions of H.R. 1915 were incorporated into H.R. 2202, 104th Cong., 1st Sess. (1995), the bill that ultimately became IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 18-19, 25-26, 234 (1996); H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 210-211 (1996). As modified in conference, IIRIRA allowed, but did not require, the release on supervision of aliens who were not removed during the removal period. H.R. Conf. Rep. No. 828, *supra*, at 53-54, 215-216. Importantly, in passing the provision authorizing continued detention after the removal period, Congress was fully aware that certain countries have refused to accept the return of their nationals.[17] Moreover, before IIRIRA's enactment, the long-term detention of Mariel Cubans had been upheld by courts and had been the subject of extensive congressional hearings. See *Barrera-Echavarria*, 44 F.3d at 1447 ("Congress has for at least four decades been aware of instances of long-term detention of excludable aliens by the executive branch."); *ibid.* n.5 (listing

[16] See also *Kim*, 538 U.S. at 518-519 (noting evidence before Congress of high rates of recidivism, including that 45% of deportable criminal aliens were arrested multiple times); *Criminal Aliens*, *supra*, at 7 (in one study, 23% of released aliens had been rearrested for crimes, including 184 felonies).

[17] See IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals); IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

congressional hearings); *Restoring Credibility*, *supra*, at 171 ("[L]ong-term detention has been a common response to immigration emergencies," including "the Mariel boatlift."). There is not a hint of any intent to restrict such detentions in the legislative history of IIRIRA, and "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

Furthermore, while Congress had in the past imposed time limits on the detention of aliens who had gained admission to the country, see *Zadvydas*, 533 U.S. at 697-698, the detention of aliens stopped at the border and then formally excluded has never been subject to such time limits. See *Mezei*, 345 U.S. at 208-209, 216; *Palma*, 676 F.2d at 104. In fact, Congress, in the past, has declined to enact legislation that would have imposed just such a time limit. See H.R. 4349, 100th Cong., 2d Sess. § 1(a) (Mar. 31, 1988); H.R. 5200, 100th Congress, 2d Sess. § 1(a) (Aug. 10, 1988). Section 1231(a)(6) thus should not be interpreted to provide the very right to parole that Congress has long declined to afford excluded aliens.

3. *The Six-Month Cap Adopted in* Zadvydas *Does Not Apply to Excluded Aliens*

In *Zadvydas*, the Court crafted a presumptive six-month cap on the post-order detention of former lawful permanent residents whose removal cannot be effectuated. The Court did so as a means of implementing its determination that Section 1231(a)(6) implicitly limits the detention of such aliens to a time period that reasonably serves the purposes of detention. 533 U.S. at 701. The Court inferred that "implicit limitation" to avoid the serious constitutional question that would arise were the statute read to permit the indefinite detention of aliens who already had effected an entry into the United States. *Id.* at 689. That judicially

inferred limitation, however, cannot logically be extended to the detention of excluded aliens, for two reasons.

a. *Preserving the Secretary's Detention Authority Serves Important Purposes.* In *Zadvydas*, this Court explained that detention of an alien who had been admitted for lawful permanent residence before being ordered removed becomes problematic under the Due Process Clause when the detention "no longer bears a reasonable relation to the purpose for which the individual was committed." 533 U.S. at 690 (quoting *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972) (internal brackets and quotation marks omitted)). For aliens previously admitted for permanent residence, the primary purpose of detaining the aliens after entry of a final order of removal is to "assur[e] the alien's presence at the moment of removal." *Zadvydas*, 533 U.S. at 699. The Court found that purpose insufficient to permit detention beyond what it concluded was a reasonable time to effect removal—presumptively, six months—because the need to "prevent[] flight * * * is weak or nonexistent where removal seems a remote possibility at best." *Id.* at 690. The Court also recognized that detention could protect the community from danger, but noted that "the alien's removable status itself[] * * * bears no relation to a detainee's dangerousness." *Id.* at 692.

By contrast, the "basic purpose" (*Zadvydas*, 533 U.S. at 699) of detaining aliens who were stopped at the border and then formally excluded through a final order of removal is exclusion itself. The central means of effectuating exclusion is to stop and hold the individual. *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 291 (1904) ("Detention or temporary confinement [i]s part of the means necessary to give effect to the exclusion."); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) (same). That purpose, moreover, does not diminish when a removal order cannot be executed. To the contrary, when, due to their mode of arrival or the

home government's refusal to accept them, aliens cannot physically be turned back at the border, the only means of exercising the United States' sovereign prerogative to exclude those aliens and to prevent them from entering American society is to detain them. There thus is a 100% correlation between the alien's excluded status and the purpose of ongoing detention, which plainly satisfies the *Zadvydas* requirement that there be a "reasonable relation" between the detention and its purpose. See 533 U.S. at 690. In addition, the government's fundamental interest in protecting the Nation's borders furnishes a "sufficiently strong special justification" to permit civil detention for purposes of constitutional analysis, see *Zadvydas*, *id.* at 690—and therefore for purposes of statutory analysis under the principle of constitutional avoidance, see *id.* at 699.

While conditional parole on the terms established by the Secretary and upon a determination by the Secretary that the alien does not pose a risk to the community is consistent with the political Branches' power of exclusion, the judicially compelled parole of an alien whom the Secretary has refused to parole because he is "likely to pose a threat to the community," unlikely "to remain nonviolent," or "likely to violate the conditions of his parole," 8 C.F.R. 212.12(d)(2); see also 8 C.F.R. 241.4(d)(1), does not comport with the historic power of exclusion. The whole purpose of exclusion is to protect the Nation prospectively from a perceived risk and to prevent harms before they happen. A judicial order of release, even if accompanied by "release conditions that may not be violated," *Zadvydas*, 533 U.S. at 696, does not adequately vindicate that interest. The nature of release conditions and the day-to-day resource constraints on immigration officials preclude the close monitoring of every paroled alien that would be necessary to preempt repeat criminal activity by those aliens whom the political Branches have deemed unfit for release and who have statistically high

rates of recidivism. The parole system, instead, is structured largely to respond after the fact to such crimes with parole revocation. Accordingly, the forced parole of excluded aliens whom the Secretary has determined pose a threat to the safety and security of the community works an expansion of the excluded alien's rights, at the expense of the public, and directly undermines the historic role and purpose of exclusion.

Some compromise of the alien's and society's competing interests may be appropriate for the *Zadvydas* aliens who had previously been admitted as lawful permanent residents and who thus were being "uprooted from our midst." *Mezei*, 345 U.S. at 215. Such aliens may have cognizable interests in "rejoin[ing] the community until the Government effects their leave." *Id.* at 215-216. But that rationale has no logical application to aliens like respondent, who were stopped at the border and then formally ordered excluded after committing crimes while released on discretionary parole. Those aliens were uprooted, not by the government, but by their own private choices, and they have no arguable preexisting liberty interest in or claim to join or rejoin American society. Indeed, aliens stopped at the border and then later ordered excluded, like the juvenile aliens in *Reno* v. *Flores*, *supra*, "are always in some form of custody." 507 U.S. at 302 (quoting *Schall* v. *Martin*, 467 U.S. 253, 265 (1984)). For them, "liberty" is *not* "the norm." *Foucha* v. *Louisiana*, 504 U.S. 71, 83 (1992). Rather, the constitutional and statutory starting point for such aliens is custody, not liberty. When their own criminal conduct leads to revocation of their parole, the only practicable option for the government is to revert back to detention.

Finally, a judicial decision requiring the Secretary, against his best judgment, to parole recidivist criminal aliens and others who have repeatedly violated parole conditions in the past would undercut the incentives for compliance with the

Secretary's terms of parole. Criminal aliens may quickly deduce that the availability of parole will be little affected by their misconduct. Reading *Zadvydas* as bestowing on excluded aliens the very privilege that was "denied them when their immigration parole was revoked on the basis of their criminal activity," *Gisbert* v. *Attorney General*, 988 F.2d 1437, 1447 (5th Cir.), as amended, 997 F.2d 1122 (1993), thus could undermine significantly the Secretary's "enforcement leverage" and the functioning of the parole system as a whole. *Morrissey* v. *Brewer*, 408 U.S. 471, 478 (1972). And it would do so at the very same time that parole would be judicially mandated for those aliens who pose the greatest risk to the public and for whom vigorous parole-compliance incentives are most needed.

b. *Extending* Zadvydas *to excluded aliens would create, not avoid, constitutional problems.* *Zadvydas*'s presumptive limit on detention was driven by constitutional doubt concerning the lawfulness of open-ended detention for aliens who had been affirmatively granted the status of lawful permanent residents. 533 U.S. at 689. No such constitutional considerations obtain here. See Section A(2), *supra*. Indeed, *Zadvydas* itself found the distinction between excluded aliens and those who have entered to be "critical" and to "ma[k]e all the difference" on the constitutional front. 533 U.S. at 693; see also *id.* at 682. Because there are no constitutional problems to avoid when the detention involves excluded aliens, Section 1231(a)(6)'s provision that the Secretary "may" detain excluded aliens should be accorded its ordinary and established meaning, which "suggests discretion" to detain—a discretion that has not historically included temporal limitations. *Id.* at 697.

The court of appeals concluded (*Xi*, 298 F.3d at 835-836), however, that *Zadvydas*'s special, constitutionally driven rule should now control all applications of the statute. Excluded aliens, in the court of appeals' view, should

effectively get to ride the litigation coattails of the lawful permanent residents in *Zadvydas*. But it is not that simple. The Constitution charges Congress, through Article I, and the President, through the Presentment Clause, Art. I, § 7, Cl. 2, with the drafting and enactment of legislation. The judiciary's task is to "interpret, rather than author," federal laws. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 n.7 (2001). The Court is "not at liberty to rewrite" Section 1231(a)(6). *Id.* at 495 n.7. When, as occurred in *Zadvydas*, the Court reads "implicit" "significant limitations" into duly enacted statutory text, 533 U.S. at 689, the Court presses the judicial role to its separation-of-powers limits. And the Court does so only when necessary to avoid the likely invalidation of an Act of Congress. "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991).

To function as a doctrine of inter-branch "respect," *Rust*, 500 U.S. at 191, the judicial adoption of "significant" extra-textual statutory limitations, *Zadvydas*, 533 U.S. at 689, must be resorted to only as a matter of strict necessity. To extend judicially developed limitations to new applications, where constitutional pressures do not support the conclusion that Congress intended such a result, would loose the doctrine from its analytical moorings. Accordingly, once the constitutional concerns attending detention of criminal aliens "evaporate," as they do when excluded aliens are at issue, the Court cannot, "through the power of precedent," create "statutes foreign to those Congress intended." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998). It is only when a "serious likelihood" of constitutional invalidation exists that "the doctrine serve[s] its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made." *Ibid.* But here, there is no "serious likelihood" that

detention—which functionally is just continued exclusion—is unconstitutional as applied to aliens stopped at the border and then formally ordered excluded after committing criminal offenses.

Such circumspection is particularly appropriate in this context because extension of *Zadvydas* to excluded aliens would actually raise rather than avoid significant constitutional questions. The doctrine of construing statutes to avoid constitutional problems is supposed to "minimize disagreement between the branches," not "aggravate that friction." *Almendarez-Torres*, 523 U.S. at 238. Since Congress first began regulating immigration in 1875, see Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, decisions about the admission or exclusion and parole of excluded aliens have been constitutionally assigned to the political Branches, because such decisions are inextricably intertwined with the conduct of foreign relations, Congress's power to regulate naturalization, U.S. Const. Art. I, § 8, and the protection of national security. This Court's cases have recognized and enforced that constitutional demarcation again and again. See Sections A(1) and A(2), *supra*. Simply put, the historic constitutional and statutory paradigms pertaining to excluded aliens and lawful permanent residents are dramatically different, and those historic, practical, and legal distinctions continue today to "ma[k]e all the difference," just as they did three years ago in *Zadvydas*, see 533 U.S. at 693. As a result, there is a difference of constitutional magnitude between courts, on the one hand, declaring and enforcing the constitutional or statutory consequences of entries by aliens that occurred independent of the Judicial Branch, and, on the other hand, courts compelling those entries in the first place over the express determination of the Executive Branch and Congress that an alien should not be admitted into American society because his criminal recidivism poses a continuing danger to the American public.

Moreover, adopting what would be, for all practical purposes, a time limit on the physical exclusion of aliens would have significant foreign policy and security implications for the United States—areas into which the judiciary should be loath to tread (if at all) without the clearest direction from Congress and the Executive Branch. See generally *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Any diminution in the political Branches' comprehensive control over the borders, the admission of aliens, and the management of international migration crises would render the Nation more vulnerable to manipulation and infiltration by hostile powers and would tie the government's hands in responding to humanitarian emergencies. Because it "would inhibit the flexibility of the political branches of government to respond to changing world conditions," that reading of Section 1231(a)(6) "should be adopted only with the greatest caution." *Diaz*, 426 U.S. at 81; see *Restoring Credibility*, *supra*, at 162-174 (discussing the complexity of immigration emergencies and the government's need for "effective and humane responses").

Cuba is a case in point. The 1980 Mariel boatlift was not the first or the last time the Castro regime used its citizens as "bargaining chips" in an attempt to pressure the United States to modify its policies toward and relations with Cuba. Human Rights Watch/Americas, *Cuba: Repression, the Exodus of August 1994, and the U.S. Response* 2 (Oct. 1994). Banking that "the appearance of loss of control over US borders—coupled with the perception inside the US that Florida might be overrun—would be viewed by US leaders as politically costlier than the alternative of dealing with him," Castro flooded the United States with 5000 migrants from the Port of Camarioca in 1965.[18]

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[18] Kelly M. Greenhill, *Engineered Migration as a Coercive Instrument: The 1994 Cuban Balseros Crisis* 13 (Feb. 2002); see *id.* at 10-17 (discussing

In 1980, anger over, among other things, the United States' immigration policies toward Cubans, public statements labeling Cuba a Soviet puppet state, and the Peruvian and Costa Rican governments' handling of the 10,000 asylum seekers that had poured into the Peruvian embassy in early 1980, prompted Castro to open the Port of Mariel, flooding the United States with more than 100,000 migrants. Wayne S. Smith, *The Closest of Enemies: A Personal and Diplomatic Account of U.S.-Cuban Relations Since 1957*, at 200-210 (1987); Engstrom, *supra*, at 47-56. As part of that migration assault on the United States, Castro forced thousands of hardened criminals out of his prisons and into the departing boats. 52 Fed. Reg. at 48,799; *Palma*, 676 F.2d at 101.

Castro again resorted to the use of humans as diplomatic weapons in 1994. In an attempt to pressure the United States to ease its economic embargo on Cuba, to alter the immigration policies that had so rankled the Castro regime for decades, and to force the United States into bilateral negotiations, Castro reopened the Port of Mariel, sending tens of thousands of Cubans to the Florida shores.[19] In April 1995, Castro threatened yet another boatlift in an effort to derail the proposed Helms-Burton legislation, see 22 U.S.C. 6021-6091. Pet. App. 2a n.1.

Further, as recent events have taught, the Cuban government is not the only foreign power or organization that thinks little of putting civilian lives at risk as part of its

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Castro's use of immigration as a foreign policy tool in the 1965, 1980, and 1994 boatlifts); Engstrom, *supra*, at 19; Alex Larzelere, *Castro's Ploy—America's Dilemma: The 1980 Cuban Boatlift* 117 n.* (1988); C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine*, 61 U. Pitt. L. Rev. 287, 312-313 (Fall 1999).

[19] See Greenhill, *supra*, at 17-25; Engstrom, *supra*, at 188; see also *Sale*, 509 U.S. at 163-164 (discussing the difficult international and diplomatic problems occasioned by the 1991 influx of Haitian migrants).

hostile endeavors. It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens stopped at the border. The "judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of [the] diplomatic repercussions" and national security consequences that would result from an immigration regime that rewarded foreign governments who evacuate their prisons or other dangerous individuals onto the United States' shores. *Aguirre-Aguirre*, 526 U.S. at 425.[20] Such judgments must be left to Congress and the President. Section 1231(a)(6), for its part, contains no trace of a congressional intent to visit such foreign policy and security consequences on the United States or to arm hostile governments or organizations with a new diplomatic weapon.[21]

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[20] See also *Zadvydas*, 533 U.S. at 711-712 (Kennedy, J., dissenting) ("[O]ther countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."); *Gisbert*, 988 F.2d at 1447 ("Accepting petitioners' arguments here would allow one country to export its unwanted nationals and force them upon another country by the simple tactic of refusing to accept their return."); *Fernandez-Roque*, 734 F.2d at 582 ("A foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back.").

[21] The statutory provisions permitting the removal of alien terrorists alone do not offer sufficient protection of the United States' national interests. First, those provisions address security risks posed by particular individuals to the United States. They do nothing to address security risks that are created by the policies of foreign governments, rather than the character of individual aliens. Second, while political terrorists can undoubtedly cause harm to the American public, public

Finally, the United States has a distinct humanitarian interest in dissuading migrants from undertaking treacherous voyages to the United States in ramshackle boats or other vessels that are so unseaworthy as effectively to preclude the government from turning the aliens back. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993). Adoption of an immigration policy that virtually guaranteed such aliens' eventual release into American society would undercut those efforts and encourage more life-endangering migrations, especially when political turmoil in or difficult diplomatic relations with the aliens' native countries suggests that the United States may not be able to effect a repatriation.

In sum, the time constraints on detention that were adopted in *Zadvydas* to avoid a constitutional question cannot be extended to excluded aliens without generating even more substantial constitutional problems and inter-Branch tension. Furthermore, while the Court in *Zadvydas* did not perceive the presumptive cap on the detention of lawful permanent residents as threatening the Nation's security, implying a time limit on the physical exclusion of criminal aliens stopped at the border would confound "the political branches' authority to control entry into the United States" and open a large "unprotected spot in the Nation's armor."

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security can also be threatened on a day-to-day basis by the lawlessness of ordinary criminals. Congress's creation of a special provision to deal with the exigencies of terrorism did not abdicate the government's historic power, through exclusion, to protect the United States from such criminal elements. Third, due to proof difficulties or the sensitivity of using classified information, the government may, at times, find it more expedient to exclude an individual based on his criminality or other factors than to attempt to prove his status as a terrorist. Nothing in the terrorism provisions suggests that Congress denominated that procedural mechanism to be the *sole* avenue for protecting the safety of the United States.

Zadvydas, 533 U.S. at 695-696 (quoting *Kwong Hai Chew*, 344 U.S. at 602).

C. The Existing Parole Scheme Adequately Protects The Interests Of Excluded Aliens Pending Their Removal

The existing federal parole schemes for Mariel Cubans and other aliens stopped at the border fairly balance the governmental and private interests at stake in the detention decision. See *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976). Due process, after all, "is flexible and calls for such procedural protections as the particular situation demands." *Brewer*, 408 U.S. at 481. Procedural due process rules," moreover, "are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978) (emphasis added). Thus, even if it is assumed, *arguendo*, that due process principles apply to some extent in this setting, the parole regulations are more than adequate.

The starting point is "analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334. On the one hand, the government's interest in "preventing danger to the community is a legitimate regulatory goal," *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), and has been "historically so regarded," *Kansas* v. *Hendricks*, 521 U.S. 346, 363 (1997). See also *Salerno*, 481 U.S. at 749 ("The government's interest in preventing crime by arrestees is both legitimate and compelling."). And the government's interest in ensuring that its parole mechanism does not operate in a manner that leaves the Nation vulnerable to manipulation by foreign powers is compelling. The public as a whole also has a weighty interest in ensuring that the parole process does not become so procedurally unwieldy or so ineffective at preventing the release of dangerous individuals that the parole program as a whole is

forced to be curtailed or abandoned. See *Greenholtz* v. *Inmates of the Nebraska Penal & Corr. Facility*, 442 U.S. 1, 13 (1979). That result, of course, would be contrary to the interests of the prospective parolees themselves. It would also deprive the public of the benefits it receives from the contributions of law-abiding parolees and the value of allowing them to integrate themselves into the life of the community to the extent that the political Branches conclude is consistent with the broader national interest. Cf. *ibid.*

On the private side, the liberty interest of an alien who was stopped at the border, whose subsequent parole has already been revoked at least once, and who has been ordered removed based on a criminal conviction in the United States is virtually non-existent (if it exists at all). Relying on *Morrissey* v. *Brewer*, and *United States* v. *Salerno*, the Sixth Circuit stressed the premium that the Due Process Clause places on protecting individuals against deprivations of liberty. *Rosales-Garcia*, 322 F.3d at 409-412. But this is not a case about terminating or depriving individuals of a pre-existing liberty. Neither respondent nor any of the other excluded aliens whose cases are pending before this Court challenges the propriety of his initial detention at the border, his parole revocation, his criminal convictions, or his subsequent re-detention. The interest asserted here thus is not against the deprivation of preexisting liberty; it is in "being denied a conditional liberty that one desires." *Greenholtz*, 442 U.S. at 9. That is "quite different." *Ibid.*

In *Greenholtz*, the Court stressed the very minimal protection that the Due Process Clause accords to the "natural desire" of those lawfully detained to be released on parole following a criminal conviction. 442 U.S. at 7. As long as the government provides an opportunity to be heard and an explanation of the grounds for denial, the Court concluded, that is all "the process that is due" under the Constitution.

Id. at 16; see *Mathews*, 424 U.S. at 333 (the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner"). If that is all the process that is due to citizens seeking parole, certainly no more process should be demanded when parole is sought by criminal aliens who were stopped at the border when they first arrived and have never acquired any right or liberty interest to be in the United States.

The existing parole regulations, both for Mariel Cubans and other aliens stopped at the border, more than satisfy that standard. The regulations provide aliens with written notice of an upcoming parole determination, the opportunity to submit material orally or in writing, and the right to have the assistance of others. 8 C.F.R. 212.12(d)(4), 241.4(g)(5), (h)(1) and (2), and (i)(5) (as amended by 67 Fed. Reg. at 39,259). Consideration also is given to the alien's institutional progress, ties to the community, criminal and disciplinary records, psychological evaluations, and any other information that is probative of whether parole is in the public interest. 8 C.F.R. 212.12(b)(1) and (d), 241.4(f). If parole is denied, a written decision is provided. 8 C.F.R. 212.12(d)(4)(i) and (iii), 241.4(i)(5).

While the Secretary places the burden of proving the absence of a threat of violence or renewed criminal activity on the alien, that is especially appropriate here in light of the alien's already established record of criminality and parole revocation. "[A] criminal record accumulated by an [excluded] alien is a good indicator of future danger," and "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist." *Demore*, 538 U.S. at 526 n.9 (quoting *Zadvydas*, 533 U.S. at

714 (Kennedy, J., dissenting)).[22] Furthermore, at the border, the burden is on the alien to demonstrate a legal basis for admission; the government need not justify its decision to exclude or to detain the alien. See *Mezei*, 345 U.S. at 209, 216. There is no reason that the excluded alien's burden should be eased after he has taken advantage of the gift of parole to commit crimes in the United States and has been formally ordered removed.[23]

Respondent and the Sixth Circuit (*Rosales-Garcia*, 322 F.2d at 410-411) decry what they perceive to be potentially indefinite detention. But nothing in the Constitution or federal law (or, for that matter, international law) forbids the United States from indefinitely excluding a criminal alien from its territory, even for life. Exclusion, by its nature, "has no obvious termination point." *Zadvydas*, 533 U.S. at 697. That is all the detention here accomplishes. Detention therefore is, by definition, "for a period reasonably necessary to secure the alien's" exclusion. *Id.* at 682.

In any event, the parole regulations guarantee annual review of the detention decision. A denial of parole thus is not for life or even for the foreseeable future. Parole is denied only for one year—even less if changed circumstances

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[22] See also *Hendricks*, 521 U.S. at 358 ("[P]revious instances of violent behavior are an important indicator of future violent tendencies.") (quoting *Heller* v. *Doe*, 509 U.S. 312, 323 (1993)); *Jones* v. *United States*, 463 U.S. 354, 364 (1983) ("The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.").

[23] The suggestion (see *Rosales-Garcia*, 322 F.3d at 410-411) that the alien must be shown to be a known risk by the same exacting standards required to detain citizens and other lawful residents fundamentally misconceives the status of an excluded alien. Heavy burdens of proof were appropriate in those cases because the detained individual possessed a preexisting "strong interest in liberty." *Salerno*, 481 U.S. at 750. Excluded aliens have no such pre-existing liberty interest, let alone a strong one, in release into American society.

warrant an earlier review. 8 C.F.R. 212.12(g)(2) and (3), 241.4(k)(2)(v) and (*l*)(3). Those annual reviews are meaningful, as the impending release of the petitioner in No. 03-7434 demonstrates. Indeed, since 1987, thousands of Mariel Cubans whose parole was revoked following a criminal conviction have been re-released on parole.

Finally, the government's ongoing diplomatic efforts to effectuate the return of excluded aliens diminish the prospect of indefinite detention. For example, the Department of Homeland Security reports that twenty aliens have already been returned to Cuba this year, and Lin Guo Xi, the alien whose supposedly indefinite detention prompted the Ninth Circuit to extend *Zadvydas* to excluded aliens in *Xi*, was recently removed to China. Removal efforts no doubt will take longer in some situations than others. But in those cases, responsibility for the alien's ongoing detention cannot fairly be laid on the United States Government alone, which has every right to exclude the alien from its territory. Responsibility more appropriately rests with the alien's country of origin, which is shirking its responsibilities to its own citizens and international law. Respondent "is no more ours than theirs." *Mezei*, 345 U.S. at 216.

Significant responsibility also rests with the alien himself, who has thrown away the opportunities for uninterrupted parole or lawful residence generously offered by the United States, choosing instead to commit crimes and victimize the very community in which he now asserts a right to reside. Nothing in law or logic compels elevating the excluded criminal alien's interests over the safety and security of the community into which he would be released. Quite the opposite is true. This Court held in *Carlson* v. *Landon*, 342 U.S. 524 (1952), that detention does not violate the Due Process Clause "where there is reasonable apprehension of

hurt from aliens," *id.* at 542.[24] And *Zadvydas* itself imposed no time limit on detention for aliens previously admitted for lawful permanent residence whose release following a formal order of removal has been revoked. To the contrary, the Court emphasized that release would be under "conditions that may not be violated." 533 U.S. at 696.

In sum, the specter of detention for life that is largely that: a specter. It has not happened for the overwhelming majority of excluded aliens. In those cases where detention is relatively prolonged, it still is only as long as is necessary to continue to effect the alien's physical exclusion from the United States or to ensure that he may be conditionally released into the community without undue risk. Those decisions concerning the detention or release of excluded aliens whose continued presence here is, *by definition*, a matter of diplimatic sensitivity (due to the other government's refusal or political inability to repatriate) must be left in the hands of the political Branches. It is precisely when foreign governments prove most intransigent and when problems posed by excluded aliens prove most intractable that flexibility for the political Branches and deference by the judiciary is most imperative. In such situations, there are admittedly no good choices. But the longstanding sovereign right of self-determination through exclusion —and the constitutional assignment of immigration, foreign relations, and national security matters to Congress and the Executive Branch—vest both the authority and the responsibility for those hard choices in the political Branches. Cf. *Sale*, 509 U.S. at 163-166, 187-188. The

[24] See *Salerno*, 481 U.S. at 748 ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."); *Greenholtz*, 442 U.S. at 8 (parole decision should reflect "what is best both for the individual inmate and for the community").

response chosen by the political Branches to migration crises—preserving the historic national prerogative of exclusion, while permitting the Secretary to detain or parole excluded aliens as circumstances warrant—carefully balances humanitarianism, national security, and the domestic safety of the American public. When foreign governments deliberately send boatloads of aliens to the shores of the United States, and when such aliens use their humanitarian parole to commit crimes against Americans, the Secretary needs the flexibility to recalibrate that balance and give real-world effect to the political Branches' combined judgment that such criminal aliens should not be here in the first place. Rather than tie the government's hands, as respondent proposes, humanitarian measures like parole can reasonably presuppose some mutuality of obligation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Constitution Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. 8 U.S.C. 1101(a)(13) provides:

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

3. 8 U.S.C. 1182(d)(5) provides:

(A) The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

(B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

4. 8 U.S.C. 1231(a) provides in pertinent part:

Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the

alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

5. 8 U.S.C. 1522(f) provides:

Assistance to States and counties for incarceration of certain Cuban nationals; priority for removal and return to Cuba

(1) The Attorney General shall pay compensation to States and to counties for costs incurred by the States and counties to confine in prisons, during the fiscal year for which such payment is made, nationals of Cuba who—

(A) were paroled into the United States in 1980 by the Attorney General,

(B) after such parole committed any violation of State or county law for which a term of imprisonment was imposed, and

(C) at the time of such parole and such violation were not aliens lawfully admitted to the United States—

(i) for permanent residence, or

(ii) under the terms of an immigrant or a non-immigrant visa issued,

under this chapter.

(2) For a State or county to be eligible to receive compensation under this subsection, the chief executive officer of the State or county shall submit to the Attorney General, in accordance with rules to be issued by the Attorney General, an application containing—

(A) the number and names of the Cuban nationals with respect to whom the State or county is entitled to such compensation, and

(B) such other information as the Attorney General may require.

(3) For a fiscal year the Attorney General shall pay the costs described in paragraph (1) to each State and county determined by the Attorney General to be eligible under paragraph (2); except that if the amounts appropriated for the fiscal year to carry out this subsection are insufficient to cover all such payments, each of such payments shall be ratably reduced so that the total of such payments equals the amounts so appropriated.

(4) The authority of the Attorney General to pay compensation under this subsection shall be effective for any fiscal year only to the extent and in such amounts as may be provided in advance in appropriation Acts.

(5) It shall be the policy of the United States Government that the President, in consultation with the Attorney General and all other appropriate Federal officials and all appropriate State and county officials referred to in paragraph (2), shall place top priority on seeking the expeditious removal from this country and the return to Cuba of Cuban nationals described in paragraph (1) by any reasonable and responsible means, and to this end the Attorney General may use the funds authorized to carry out this subsection to conduct such policy.

7. 8 C.F.R. 212.5 provides:

Parole of aliens into the United States.

(a) The authority of the Secretary to continue an alien in custody or grant parole under section 212(d)(5)(A) of the Act shall be exercised by the Assistant Commissioner, Office of Field Operations; Director, Detention and Removal; directors of field operations; port directors; special agents in charge; deputy special agents in charge; associate special agents in charge; assistant special agents in charge; resident agents in charge; field office directors; deputy field office directors; chief patrol agents; district directors for services; and those other officials as may be designated in writing, subject to the parole and detention authority of the Secretary or his designees. The Secretary or his designees may invoke, in the exercise of discretion, the authority under section 212(d)(5)(A) of the Act.

(b) The parole of aliens within the following groups who have been or are detained in accordance with § 235.3(b) or (c) of this chapter would generally be justified only on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," provided the aliens present neither a security risk nor a risk of absconding:

(1) Aliens who have serious medical conditions in which continued detention would not be appropriate;

(2) Women who have been medically certified as pregnant;

(3) Aliens who are defined as juveniles in § 236.3(a) of this chapter. The Director, Detention and Removal; directors of field operations; field office directors; deputy field office directors; or chief patrol agents shall follow the guidelines set forth in § 236.3(a) of this chapter and paragraphs

(b)(3)(i) through (iii) of this section in determining under what conditions a juvenile should be paroled from detention:

(i) Juveniles may be released to a relative (brother, sister, aunt, uncle, or grandparent) not in Service detention who is willing to sponsor a minor and the minor may be released to that relative notwithstanding that the juvenile has a relative who is in detention.

(ii) If a relative who is not in detention cannot be located to sponsor the minor, the minor may be released with an accompanying relative who is in detention.

(iii) If the Service cannot locate a relative in or out of detention to sponsor the minor, but the minor has identified a non-relative in detention who accompanied him or her on arrival, the question of releasing the minor and the accompanying non-relative adult shall be addressed on a case-by-case basis;

(4) Aliens who will be witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies in the United States; or

(5) Aliens whose continued detention is not in the public interest as determined by those officials identified in paragraph (a) of this section.

(c) In the case of all other arriving aliens, except those detained under § 235.3(b) or (c) of this chapter and paragraph (b) of this section, those officials listed in paragraph (a) of this section may, after review of the individual case, parole into the United States temporarily in accordance with section 212(d)(5)(A) of the Act, any alien applicant for admission, under such terms and conditions, including those set forth in paragraph (d) of this section, as he or she may deem appropriate. An alien who arrives at a port-of-entry and applies for parole into the United States for the sole purpose of seeking adjustment of status under section 245A of the

Act, without benefit of advance authorization as described in paragraph (f) of this section shall be denied parole and detained for removal in accordance with the provisions of § 235.3(b) or (c) of this chapter. An alien seeking to enter the United States for the sole purpose of applying for adjustment of status under section 210 of the Act shall be denied parole and detained for removal under § 235.3(b) or (c) of this chapter, unless the alien has been recommended for approval of such application for adjustment by a consular officer at an Overseas Processing Office.

(d) *Conditions.* In any case where an alien is paroled under paragraph (b) or (c) of this section, those officials listed in paragraph (a) of this section may require reasonable assurances that the alien will appear at all hearings and/or depart the United States when required to do so. Not all factors listed need be present for parole to be exercised. Those officials should apply reasonable discretion. The consideration of all relevant factors includes:

(1) The giving of an undertaking by the applicant, counsel, or a sponsor to ensure appearances or departure, and a bond may be required on Form I-352 in such amount as may be deemed appropriate;

(2) Community ties such as close relatives with known addresses; and

(3) Agreement to reasonable conditions (such as periodic reporting of whereabouts).

(e) *Termination of parole*—(1) *Automatic.* Parole shall be automatically terminated without written notice (i) upon the departure from the United States of the alien, or, (ii) if not departed, at the expiration of the time for which parole was authorized, and in the latter case the alien shall be processed in accordance with paragraph (e)(2) of this section except that no written notice shall be required.

(2)(i) *On notice.* In cases not covered by paragraph (e)(1) of this section, upon accomplishment of the purpose for which parole was authorized or when in the opinion of one of the officials listed in paragraph (a) of this section, neither humanitarian reasons nor public benefit warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status that he or she had at the time of parole. When a charging document is served on the alien, the charging document will constitute written notice of termination of parole, unless otherwise specified. Any further inspection or hearing shall be conducted under section 235 or 240 of the Act and this chapter, or any order of exclusion, deportation, or removal previously entered shall be executed. If the exclusion, deportation, or removal order cannot be executed within a reasonable time, the alien shall again be released on parole unless in the opinion of the official listed in paragraph (a) of this section the public interest requires that the alien be continued in custody.

(ii) An alien who is granted parole into the United States after enactment of the Immigration Reform and Control Act of 1986 for other than the specific purpose of applying for adjustment of status under section 245A of the Act shall not be permitted to avail him or herself of the privilege of adjustment thereunder. Failure to abide by this provision through making such an application will subject the alien to termination of parole status and institution of proceedings under sections 235 and 236 of the Act without the written notice of termination required by § 212.5(e)(2)(i) of this chapter.

(f) *Advance authorization.* When parole is authorized for an alien who will travel to the United States without a visa, the alien shall be issued Form I-512.

(g) *Parole for certain Cuban nationals.* Notwithstanding any other provision respecting parole, the determination whether to release on parole, or to revoke the parole of, a native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980, shall be governed by the terms of § 212.12.

(h) *Effect of parole of Cuban and Haitian nationals.* (1) Except as provided in paragraph (h)(2) of this section, any national of Cuba or Haiti who was paroled into the United States on or after October 10, 1980, shall be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended (8 U.S.C. 1522 note).

(2) A national of Cuba or Haiti shall not be considered to have been paroled in the special status for nationals of Cuba or Haiti, referred to in section 501(e)(1) of the Refugee Education Assistance Act of 1980, Public Law 96-422, as amended, if the individual was paroled into the United States:

(i) In the custody of a Federal, State or local law enforcement or prosecutorial authority, for purposes of criminal prosecution in the United States; or

(ii) Solely to testify as a witness in proceedings before a judicial, administrative, or legislative body in the United States.

8. 8 C.F.R. 212.12 provides:

Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to

the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) Record review. Initially, the Director or a Panel shall review the detainee's file. Upon completion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) Personal interview. If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) Panel recommendation. Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or

any other circumstance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under § 212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.

9. 8 C.F.R. 241.4 provides:

Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

(a) *Scope.* The authority to continue an alien in custody or grant release or parole under sections 241(a)(6) and 212(d)(5)(A) of the Act shall be exercised by the Commissioner or Deputy Commissioner, as follows: Except as otherwise directed by the Commissioner or his or her designee, the Executive Associate Commissioner for Field Operations (Executive Associate Commissioner), the Deputy Executive Associate Commissioner for Detention and Removal, the Director of the Detention and Removal Field Office or the district director may continue an alien in custody beyond the removal period described in section 241(a)(1) of the Act pursuant to the procedures described in this section. Except as provided for in paragraph (b)(2) of this section, the provisions of this section apply to the custody determinations for the following group of aliens:

(1) An alien ordered removed who is inadmissible under section 212 of the Act, including an excludable alien convicted of one or more aggravated felony offenses and subject to the provisions of section 501(b) of the Immigration Act of 1990, Public Law 101-649, 104 Stat. 4978, 5048 (codified at 8 U.S.C. 1226(e)(1) through (e)(3)(1994));

(2) An alien ordered removed who is removable under section 237(a)(1)(C) of the Act;

(3) An alien ordered removed who is removable under sections 237(a)(2) or 237(a)(4) of the Act, including deportable criminal aliens whose cases are governed by former section 242 of the Act prior to amendment by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Public Law 104-208, 110 Stat. 3009-546; and

(4) An alien ordered removed who the decision-maker determines is unlikely to comply with the removal order or is a risk to the community.

(b) *Applicability to particular aliens*—(1) *Motions to reopen.* An alien who has filed a motion to reopen immigration proceedings for consideration of relief from removal, including withholding or deferral of removal pursuant to 8 CFR 208.16 or 208.17, shall remain subject to the provisions of this section unless the motion to reopen is granted. Section 236 of the Act and 8 CFR 236.1 govern custody determinations for aliens who are in pending immigration proceedings before the Executive Office for Immigration Review.

(2) *Parole for certain Cuban nationals.* The review procedures in this section do not apply to any inadmissible Mariel Cuban who is being detained by the Service pending an exclusion or removal proceeding, or following entry of a final exclusion or pending his or her return to Cuba or removal to another country. Instead, the determination whether to release on parole, or to revoke such parole, or to detain, shall in the case of a Mariel Cuban be governed by the procedures in 8 CFR 212.12.

(3) *Individuals granted withholding or deferral of removal.* Aliens granted withholding of removal under section 241(b)(3) of the Act or withholding or deferral of removal under the Convention Against Torture who are otherwise subject to detention are subject to the provisions of this part 241. Individuals subject to a termination of deferral hearing under 8 CFR 208.17(d) remain subject to the provisions of this part 241 throughout the termination process.

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after

the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

(c) *Delegation of authority.* The Attorney General's statutory authority to make custody determinations under sections 241(a)(6) and 212(d)(5)(A) of the Act when there is a final order of removal is delegated as follows:

(1) *District Directors and Directors of Detention and Removal Field Offices.* The initial custody determination described in paragraph (h) of this section and any further custody determination concluded in the 3 month period immediately following the expiration of the 90-day removal period, subject to the provisions of paragraph (c)(2) of this section, will be made by the district director or the Director of the Detention and Removal Field Office having jurisdiction over the alien. The district director or the Director of the Detention and Removal Field Office shall maintain appropriate files respecting each detained alien reviewed for possible release, and shall have authority to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews in his or her respective jurisdictional area.

(2) *Headquarters Post-Order Detention Unit (HQPDU).* For any alien the district director refers for further review after the removal period, or any alien who has not been released or removed by the expiration of the three-month

period after the review, all further custody determinations will be made by the Executive Associate Commissioner, acting through the HQPDU.

(3) *The HQPDU review plan.* The Executive Associate Commissioner shall appoint a Director of the HQPDU. The Director of the HQPDU shall have authority to establish and maintain appropriate files respecting each detained alien to be reviewed for possible release, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(4) *Additional delegation of authority.* All references to the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, and the district director in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Executive Associate Commissioner, the Director of the Detention and Removal Field Office, or the district director to exercise powers under this section.

(d) *Custody determinations.* A copy of any decision by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner to release or to detain an alien shall be provided to the detained alien. A decision to retain custody shall briefly set forth the reasons for the continued detention. A decision to release may contain such special conditions as are considered appropriate in the opinion of the Service. Notwithstanding any other provisions of this section, there is no appeal from the district director's, Director of the Detention and Removal Field Office's or the Executive Associate Commissioner's decision.

(1) *Showing by the alien.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may release an alien if the alien

demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States. The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may also, in accordance with the procedures and consideration of the factors set forth in this section, continue in custody any alien described in paragraphs (a) and (b)(1) of this section.

(2) *Service of decision and other documents.* All notices, decisions, or other documents in connection with the custody reviews conducted under this section by the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall be served on the alien, in accordance with 8 CFR 103.5a, by the Service district office having jurisdiction over the alien. Release documentation (including employment authorization if appropriate) shall be issued by the district office having jurisdiction over the alien in accordance with the custody determination made by the district director, Director of the Detention and Removal Field Office, or by the Executive Associate Commissioner. Copies of all such documents will be retained in the alien's record and forwarded to the HQPDU.

(3) *Alien's representative.* The alien's representative is required to complete Form G-28, Notice of Entry of Appearance as Attorney or Representative, at the time of the interview or prior to reviewing the detainee's records. The Service will forward by regular mail a copy of any notice or decision that is being served on the alien only to the attorney or representative of record. The alien remains responsible for notification to any other individual providing assistance to him or her.

(e) *Criteria for release.* Before making any recommendation or decision to release a detainee, a majority of the Review Panel members, or the Director of the HQPDU in the case of a record review, must conclude that:

(1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;

(2) The detainee is presently a non-violent person;

(3) The detainee is likely to remain nonviolent if released;

(4) The detainee is not likely to pose a threat to the community following release;

(5) The detainee is not likely to violate the conditions of release; and

(6) The detainee does not pose a significant flight risk if released.

(f) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release of a detainee:

(1) The nature and number of disciplinary infractions or incident reports received when incarcerated or while in Service custody;

(2) The detainee's criminal conduct and criminal convictions, including consideration of the nature and severity of the alien's convictions, sentences imposed and time actually served, probation and criminal parole history, evidence of recidivism, and other criminal history;

(3) Any available psychiatric and psychological reports pertaining to the detainee's mental health;

(4) Evidence of rehabilitation including institutional progress relating to participation in work, educational, and vocational programs, where available;

(5) Favorable factors, including ties to the United States such as the number of close relatives residing here lawfully;

(6) Prior immigration violations and history;

(7) The likelihood that the alien is a significant flight risk or may abscond to avoid removal, including history of escapes, failures to appear for immigration or other proceedings, absence without leave from any halfway house or sponsorship program, and other defaults; and

(8) Any other information that is probative of whether the alien is likely to—

(i) Adjust to life in a community,

(ii) Engage in future acts of violence,

(iii) Engage in future criminal activity,

(iv) Pose a danger to the safety of himself or herself or to other persons or to property, or

(v) Violate the conditions of his or her release from immigration custody pending removal from the United States.

(g) *Travel documents and docket control for aliens continued in detention*—(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) The date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which,

consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

(2) *In general.* The district director shall continue to undertake appropriate steps to secure travel documents for the alien both before and after the expiration of the removal period. If the district director is unable to secure travel documents within the removal period, he or she shall apply for assistance from Headquarters Detention and Deportation, Office of Field Operations. The district director shall promptly advise the HQPDU Director when travel documents are obtained for an alien whose custody is subject to review by the HQPDU. The Service's determination that receipt of a travel document is likely may by itself warrant continuation of detention pending the removal of the alien from the United States.

(3) *Availability of travel document.* In making a custody determination, the district director and the Director of the HQPDU shall consider the ability to obtain a travel document for the alien. If it is established at any stage of a custody review that, in the judgment of the Service, travel documents can be obtained, or such document is forthcoming, the alien will not be released unless immediate removal is not practicable or in the public interest.

(4) *Removal.* The Service will not conduct a custody review under these procedures when the Service notifies the alien that it is ready to execute an order of removal.

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section

until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

(h) *District director's or Director of the Detention and Removal Field Office's custody review procedures.* The district director's or Director of the Detention and Removal Field Office's custody determination will be developed in accordance with the following procedures:

(1) *Records review.* The district director or Director of the Detention and Removal Field Office will conduct the initial custody review. For aliens described in paragraphs (a) and (b)(1) of this section, the district director or Director of the Detention and Removal Field Office will conduct a records review prior to the expiration of the removal period. This initial post-order custody review will consist of a review of the alien's records and any written information submitted in English to the district director or Director of the Detention and Removal Field Office by or on behalf of the alien. However, the district director or Director of the Detention and Removal Field Office may in his or her discretion schedule a personal or telephonic interview with the alien as part of this custody determination. The district director or Director of the Detention and Removal Field Office may also consider any other relevant information relating to the alien or his or her circumstances and custody status.

(2) *Notice to alien.* The district director or Director of the Detention and Removal Field Office will provide written notice to the detainee approximately 30 days in advance of the pending records review so that the alien may submit

information in writing in support of his or her release. The alien may be assisted by a person of his or her choice, subject to reasonable security concerns at the institution and panel's discretion, in preparing or submitting information in response to the district director's or Director of the Detention and Removal Field Office's notice. Such assistance shall be at no expense to the Government. If the alien or his or her representative requests additional time to prepare materials beyond the time when the district director or Director of the Detention and Removal Field Office expects to conduct the records review, such a request will constitute a waiver of the requirement that the review occur prior to the expiration of the removal period.

(3) *Factors for consideration.* The district director's or Director of the Detention and Removal Field Office's review will include but is not limited to consideration of the factors described in paragraph (f) of this section. Before making any decision to release a detainee, the district director or Director of the Detention and Removal Field Office must be able to reach the conclusions set forth in paragraph (e) of this section.

(4) *District director's or Director of the Detention and Removal Field Office's decision.* The district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(5) *District office or Detention and Removal Field office staff.* The district director or the Director of the Detention and Removal Field Office may delegate the authority to conduct the custody review, develop recommendations, or render the custody or release decisions to those persons directly responsible for detention within his or her geographical

areas of responsibility. This includes the deputy district director, the assistant director for detention and deportation, the officer-in-charge of a detention center, the assistant director of the detention and removal field office, the director of the detention and removal resident office, the assistant director of the detention and removal resident office, officers in charge of service processing centers, or such other persons as the district director or the Director of the Detention and Removal Field Office may designate from the professional staff of the Service.

(i) *Determinations by the Executive Associate Commissioner.* Determinations by the Executive Associate Commissioner to release or retain custody of aliens shall be developed in accordance with the following procedures.

(1) *Review panels.* The HQPDU Director shall designate a panel or panels to make recommendations to the Executive Associate Commissioner. A Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by the two-member Review Panel shall be unanimous. If the vote of the two-member Review Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Review Panel member is added. The third member of any Review Panel shall be the Director of the HQPDU or his or her designee. A recommendation by a three-member Review Panel shall be by majority vote.

(2) *Records review.* Initially, and at the beginning of each subsequent review, the HQPDU Director or a Review Panel shall review the alien's records. Upon completion of this records review, the HQPDU Director or the Review Panel may issue a written recommendation that the alien be released and reasons therefore.

(3) *Personal interview.* (i) If the HQPDU Director does not accept a panel's recommendation to grant release after a records review, or if the alien is not recommended for release, a Review Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the HQPDU Director. The HQPDU Director will provide a translator if he or she determines that such assistance is appropriate.

(ii) The alien may be accompanied during the interview by a person of his or her choice, subject to reasonable security concerns at the institution's and panel's discretion, who is able to attend at the time of the scheduled interview. Such assistance shall be at no expense to the Government. The alien may submit to the Review Panel any information, in English, that he or she believes presents a basis for his or her release.

(4) *Alien's participation.* Every alien shall respond to questions or provide other information when requested to do so by Service officials for the purpose of carrying out the provisions of this section.

(5) *Panel recommendation.* Following completion of the interview and its deliberations, the Review Panel shall issue a written recommendation that the alien be released or remain in custody pending removal or further review. This written recommendation shall include a brief statement of the factors that the Review Panel deems material to its recommendation.

(6) *Determination.* The Executive Associate Commissioner shall consider the recommendation and appropriate custody review materials and issue a custody determination, in the exercise of discretion under the standards of this section. The Executive Associate Commissioner's review will include but is not limited to consideration of the factors

described in paragraph (f) of this section. Before making any decision to release a detainee, the Executive Associate Commissioner must be able to reach the conclusions set forth in paragraph (e) of this section. The Executive Associate Commissioner is not bound by the panel's recommendation.

(7) *No significant likelihood o[f] removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(j) *Conditions of release*—(1) *In general.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner shall impose such conditions or special conditions on release as the Service considers appropriate in an individual case or cases, including but not limited to the conditions of release noted in 8 CFR 212.5(c) and § 241.5. An alien released under this section must abide by the release conditions specified by the Service in relation to his or her release or sponsorship.

(2) *Sponsorship.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, condition

release on placement with a close relative who agrees to act as a sponsor, such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States, or may condition release on the alien's placement or participation in an approved halfway house, mental health project, or community project when, in the opinion of the Service, such condition is warranted. No detainee may be released until sponsorship, housing, or other placement has been found for the detainee, if ordered, including but not limited to, evidence of financial support.

(3) *Employment authorization.* The district director, Director of the Detention and Removal Field Office, and the Executive Associate Commissioner, may, in the exercise of discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner may, in the exercise of discretion, withdraw approval for release of any detained alien prior to release when, in the decision-maker's opinion, the conduct of the detainee, or any other circumstance, indicates that release would no longer be appropriate.

(k) *Timing of reviews.* The timing of reviews shall be in accordance with the following guidelines:

(1) *District director or Director of the Detention and Removal Field Office.* (i) Prior to the expiration of the removal period, the district director or Director of the Detention and Removal Field Office shall conduct a custody review for an alien described in paragraphs (a) and (b)(1) of this section where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien, or removal of the alien prior

to expiration of the removal period is impracticable or contrary to the public interest. As provided in paragraph (h)(4) of this section, the district director or Director of the Detention and Removal Field Office will notify the alien in writing that he or she is to be released from custody, or that he or she will be continued in detention pending removal or further review of his or her custody status.

(ii) When release is denied pending the alien's removal, the district director or Director of the Detention and Removal Field Office in his or her discretion may retain responsibility for custody determinations for up to three months after expiration of the removal period, during which time the district director or Director of the Detention and Removal Field Office may conduct such additional review of the case as he or she deems appropriate. The district director or Director of the Detention and Removal Field Office may release the alien if he or she is not removed within the three-month period following the expiration of the removal period, in accordance with paragraphs (e), (f), and (j) of this section, or the district director or Director of the Detention and Removal Field Office may refer the alien to the HQPDU for further custody review.

(2) *HQPDU reviews*—(i) *District director or Director of the Detention and Removal Field Office referral for further review.* When the district director or Director of the Detention and Removal Field Office refers a case to the HQPDU for further review, as provided in paragraph (c)(2) of this section, authority over the custody determination transfers to the Executive Associate Commissioner, according to procedures established by the HQPDU. The Service will provide the alien with approximately 30 days notice of this further review, which will ordinarily be conducted by the expiration of the removal period or as soon thereafter as practicable.

(ii) *District director or Director of the Detention and Removal Field Office retains jurisdiction.* When the district director or Director of the Detention and Removal Field Office has advised the alien at the 90-day review as provided in paragraph (h)(4) of this section that he or she will remain in custody pending removal or further custody review, and the alien is not removed within three months of the district director's or Director of the Detention and Removal Field Office's decision, authority over the custody determination transfers from the district director or Director of the Detention and Removal Field Office to the Executive Associate Commissioner. The initial HQPDU review will ordinarily be conducted at the expiration of the three-month period after the 90-day review or as soon thereafter as practicable. The Service will provide the alien with approximately 30 days notice of that review.

(iii) *Continued detention cases.* A subsequent review shall ordinarily be commenced for any detainee within approximately one year of a decision by the Executive Associate Commissioner declining to grant release. Not more than once every three months in the interim between annual reviews, the alien may submit a written request to the HQPDU for release consideration based on a proper showing of a material change in circumstances since the last annual review. The HQPDU shall respond to the alien's request in writing within approximately 90 days.

(iv) *Review scheduling.* Reviews will be conducted within the time periods specified in paragraphs (k)(1)(i), (k)(2)(i), (k)(2)(ii), and (k)(2)(iii) of this section or as soon as possible thereafter, allowing for any unforeseen circumstances or emergent situation.

(v) *Discretionary reviews.* The HQPDU Director, in his or her discretion, may schedule a review of a detainee at

shorter intervals when he or she deems such review to be warranted.

(3) *Postponement of review.* In the case of an alien who is in the custody of the Service, the district director or the HQPDU Director may, in his or her discretion, suspend or postpone the custody review process if such detainee's prompt removal is practicable and proper, or for other good cause. The decision and reasons for the delay shall be documented in the alien's custody review file or A file, as appropriate. Reasonable care will be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied or if the alien is not removed from the United States as anticipated at the time review was suspended or postponed.

(4) *Transition provisions.* (i) The provisions of this section apply to cases that have already received the 90-day review. If the alien's last review under the procedures set out in the Executive Associate Commissioner memoranda entitled *Detention Procedures for Aliens Whose Immediate Repatriation is Not Possible or Practicable*, February 3, 1999; *Supplemental Detention Procedures*, April 30, 1999; *Interim Changes and Instructions for Conduct of Post-order Custody Reviews*, August 6, 1999; *Review of Long-term Detainees*, October 22, 1999, was a records review and the alien remains in custody, the HQPDU will conduct a custody review within six months of that review (Memoranda available at http:// www.ins.usdoj.gov). If the alien's last review included an interview, the HQPDU review will be scheduled one year from the last review. These reviews will be conducted pursuant to the procedures in paragraph (i) of this section, within the time periods specified in this paragraph or as soon as possible thereafter, allowing for resource limitations, unforeseen circumstances, or an emergent situation.

(ii) Any case pending before the Board on December 21, 2000 will be completed by the Board. If the Board affirms

the district director's decision to continue the alien in detention, the next scheduled custody review will be conducted one year after the Board's decision in accordance with the procedures in paragraph (i) of this section.

(l) *Revocation of release*—(1) *Violation of conditions of release.* Any alien described in paragraph (a) or (b)(1) of this section who has been released under an order of supervision or other conditions of release who violates the conditions of release may be returned to custody. Any such alien who violates the conditions of an order of supervision is subject to the penalties described in section 243(b) of the Act. Upon revocation, the alien will be notified of the reasons for revocation of his or her release or parole. The alien will be afforded an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification.

(2) *Determination by the Service.* The Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section. A district director may also revoke release of an alien when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Executive Associate Commissioner. Release may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(i) The purposes of release have been served;

(ii) The alien violates any condition of release;

(iii) It is appropriate to enforce a removal order or to commence removal proceedings against an alien; or

(iv) The conduct of the alien, or any other circumstance, indicates that release would no longer be appropriate.

(3) *Timing of review when release is revoked.* If the alien is not released from custody following the informal interview provided for in paragraph (l)(1) of this section, the HQPDU Director shall schedule the review process in the case of an alien whose previous release or parole from immigration custody pursuant to a decision of either the district director, Director of the Detention and Removal Field Office, or Executive Associate Commissioner under the procedures in this section has been or is subject to being revoked. The normal review process will commence with notification to the alien of a records review and scheduling of an interview, which will ordinarily be expected to occur within approximately three months after release is revoked. That custody review will include a final evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release. Thereafter, custody reviews will be conducted annually under the provisions of paragraphs (i), (j), and (k) of this section.

10. 8 C.F.R. 241.5 provides:

Conditions of release after removal period.

(a) *Order of supervision.* An alien released pursuant to § 241.4 shall be released pursuant to an order of supervision. The Commissioner, Deputy Commissioner, Executive Associate Commissioner Field Operations, regional director, district director, acting district director, deputy district director, assistant district director for investigations, assistant district director for detention and deportation, or officer-in-charge may issue Form I-220B, Order of Supervision. The order shall specify conditions of supervision including, but not limited to, the following:

(1) A requirement that the alien report to a specified officer periodically and provide relevant information under oath as directed;

(2) A requirement that the alien continue efforts to obtain a travel document and assist the Service in obtaining a travel document;

(3) A requirement that the alien report as directed for a mental or physical examination or examinations as directed by the Service;

(4) A requirement that the alien obtain advance approval of travel beyond previously specified times and distances;

(5) A requirement that the alien provide the Service with written notice of any change of address on Form AR-11 within ten days of the change.

(b) *Posting of bond.* An officer authorized to issue an order of supervision may require the posting of a bond in an amount determined by the officer to be sufficient to ensure compliance with the conditions of the order, including surrender for removal.

(c) *Employment authorization.* An officer authorized to issue an order of supervision may, in his or her discretion, grant employment authorization to an alien released under an order of supervision if the officer specifically finds that:

(1) The alien cannot be removed because no country will accept the alien; or

(2) The removal of the alien is impracticable or contrary to the public interest.

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In The

Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

In *Zadvydas v. Davis,* 533 U.S. 678 (2001), this Court interpreted the post-removal-period detention statute (8 U.S.C. § 1231(a)(6)) to limit detention to a period reasonably necessary to effectuate removal, generally presumed to be six months. In *Zadvydas*, the aliens in question were former permanent residents whom the government ordered removed on grounds of deportability due to criminal conduct. Mr. Martinez was ordered removed in 2001 on grounds of inadmissibility due to criminal conduct after the government had paroled him into the United States in 1980 during the Mariel Boatlift from Cuba.

The question presented is whether the Ninth Circuit erred in holding that, because section 1231(a)(6) applies uniformly to both inadmissible aliens and deportable aliens, no basis exists for construing the statute differently in this case from its construction in *Zadvydas* and, therefore, the statute does not authorize indefinite detention of an inadmissible alien who is under a final order of removal, but whom the government cannot remove in the reasonably foreseeable future.

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OPINIONS BELOW

The district court granted habeas corpus relief requiring the government to release Mr. Martinez on conditions based on *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), which held that this Court's construction of 8 U.S.C. § 1231(a)(6) (2000) in *Zadvydas v. Davis*, 533 U.S. 678 (2001), applies with equal force to aliens found inadmissible as it does to those found deportable, because the statute's text treats identically all categories of aliens within its scope. (Dist. Ct. Order Granting Pet. (Oct. 30, 2002).) Upon Mr. Martinez's motion for summary affirmance, and the government's request for summary disposition, in which it acknowledged that *Lin Guo Xi* controlled, the Ninth Circuit affirmed the district court's order of conditional release. (Ninth Circuit Order Granting Appellee's Mot. Summ. J. (Aug. 18, 2003).)

CONSTITUTIONAL PROVISIONS AND STATUTES

"No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . . " U.S. CONST. amend. V.

The statute regarding detention, release, and removal of aliens ordered removed states:

> (1) Removal period
>
> (A) In General
>
> Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").
>
> . . . .
>
> (3) Supervision after 90-day period
>
> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. . . .

. . . .

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a).

STATEMENT OF THE CASE

The statute at issue involves aliens who have been ordered removed, not aliens seeking entry to this country. Section 1231(a)(6) governs detention of aliens ordered removed after the expiration of the 90-day removal period established in section 1231(a)(1). The statutory text covers broad categories of aliens ordered removed and treats them uniformly. Because the decision to order Mr. Martinez released on conditions depended on the text of the statute, and that text is immutable, its application to Mr. Martinez does not depend upon his particular circumstances or the details of the 1980 Freedom Flotilla from Mariel, Cuba. Nevertheless, this brief addresses both to inform the legal analysis.

A. The Government Obscures the Relevant Statutory Framework by its Use of "Excluded" and "Paroled" Alien to Refer to an Alien Ordered Removed as Inadmissible and Released on Conditions.

In its characterization of the statutory framework and throughout its brief, the government refers to Mr. Martinez and others similarly situated as "excluded" aliens "for ease of reference" (Br. for Pet'rs at 3), phrases the issue as involving "a right to be paroled into the United States,"

(Br. for Pet'rs at 12), and characterizes the relief granted by the district court as "parole" (*id.*). Use of this nomenclature obscures the relevant statutory framework and the relevant facts. Under section 1231(a)(6), Mr. Martinez is an alien "ordered removed who is inadmissible," whose court-ordered relief from indefinite detention was release on supervision under 8 U.S.C. § 1231(a)(3), not parole under 8 U.S.C. § 1182(d)(5) (2000 & Supp. I 2001).

1. As an Alien "Ordered Removed Who Is Inadmissible," Mr. Martinez Is Subject to the Post-Removal-Period Detention Provisions of 8 U.S.C. § 1231(a)(6).

The government's persistent use of the term "excluded" conflicts with the statutory language adopted in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996), and reiterated in the USA PATRIOT Act, Pub. L. No. 107-56, Title IV, § 412(a), 115 Stat. 350 (2001). In IIRIRA's amendments to the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, Congress eliminated the term "excludable" alien and created a new, broader category of aliens termed "inadmissible." 8 U.S.C. § 1182.[1] In 2001, Congress amended the INA again after *Zadvydas v. Davis*, 533 U.S. 678 (2001), to address detention issues and, again, treated aliens ordered removed the same, whether the removal order was based on deportability or inadmissibility. 8 U.S.C. § 1226a(a)(6) and (7) (Supp. I 2001).

In providing for the post-removal-period detention of aliens in section 1231(a)(6), Congress treated aliens ordered removed as inadmissible under 8 U.S.C. § 1182 in the same manner as aliens ordered removed under 8 U.S.C.

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[1] The term "excludable" derives from statutory exclusion proceedings. 8 U.S.C. § 1226 (1994), *amended by* Pub. L. No. 104-208, § 303(a), 110 Stat. 3009 (1996). Congress abolished separate proceedings for exclusion and deportation in favor of a single proceeding for both inadmissible and deportable aliens, now called "removal proceedings." 8 U.S.C. § 1229a (2000).

§ 1227 (2000 & Supp. I 2001). The first clause of section 1231(a)(6) groups aliens formerly classified as excludable – arriving aliens or those like Mr. Martinez who were paroled into the United States – with those who gained entry into the United States without having been admitted, such as those who are present without having been inspected at a border. 8 U.S.C. § 1182(a). This class includes aliens deemed inadmissible for health-related grounds, criminal convictions, prostitution, security-related grounds, illegal entrance, unlawful presence, and miscellaneous other grounds. The detention statute makes no distinctions based on entry among the groups covered by section 1182.[2]

The second clause of section 1231(a)(6) isolates subcategories, all of which pertain to aliens removable due to deportability under section 1227: aliens who violated nonimmigrant status, failed to comply with health-related conditions for admission, committed criminal offenses, engaged in security-related misconduct, or otherwise present a risk to the community or of flight. The category of removable due to deportability also treats aliens with criminal convictions uniformly, regardless of whether they had been admitted only temporarily or had received permanent resident status.

Section 1231(a)(6) draws no distinctions among classes of aliens: deportable aliens can have the same type of criminal history as inadmissible aliens. Further, the immigration status of aliens subject to final removal orders bears no relation to their previous legal status. Regardless of their previous status, removable aliens stand on the same legal footing: they no longer have the right to enter or to remain in the United States. 8 U.S.C. § 1229a(e)(2) (defining "removable" as aliens ordered removed on grounds of inadmissibility or deportability).

[2] By regulation, the government treats inadmissible aliens who entered without inspection as protected under *Zadvydas*. 8 C.F.R. § 241.13 (2004). *See also* 8 C.F.R. § 241.4 (2004) (providing for continued detention of all removable aliens except Mariel Cubans).

The uniform treatment of the two groups of removable aliens also inheres in the statute enacted after *Zadvydas* that specifically authorizes the indefinite detention of an alien presenting a national security risk, without regard to whether the alien is deportable or inadmissible. 8 U.S.C. § 1226a. These provisions apply only to those aliens certified by the Attorney General as: a) inadmissible and involved with sabotage, espionage, or subversion (8 U.S.C. § 1182(a)(3)(A)(i) and (iii)); b) deportable and involved with sabotage, espionage, subversion, or terrorism (8 U.S.C. § 1227(a)(4)(A)(i) and (iii) and 1227(a)(4)(B)); and c) regardless of inadmissibility or deportability, otherwise engaged in activity that endangers national security (8 U.S.C. § 1226a(a)(3)(A) and (B)). The statute includes a number of procedural protections absent from section 1231(a)(6). 8 U.S.C. § 1226a(a)(3), (6), and (7)(b). Regardless of whether the removal is based on inadmissibility or deportability, an alien certified under section 1226a(a) "whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6) ("Limitation on indefinite detention").

The government's persistent use of "excluded" thus fails to respect three legislative decisions of Congress: to treat equally under the detention statute aliens who are removable as inadmissible and those who are removable as deportable; to replace the "excludable" category with the broader category of inadmissible aliens; and to provide explicit procedural rules where, as with national security risks, indefinite detention may result, regardless of whether deportability or inadmissibility forms the basis for removal.

2. The Parole Statute Addresses Entry into the United States and Does Not Provide for Authority That Duplicates Section 1231(a)(6)'s Authorization for Release on Conditions.

The government's claim that the issue involves an asserted right to "parole" refers to the wrong statute. Parole is a device for temporary release of aliens seeking admission for, among other reasons, urgent humanitarian reasons. 8 U.S.C. § 1182(d)(5). Once the purpose of parole has been satisfied or parole has been revoked, the parole statute refers to admission and removal procedures for disposition of the former parolee: "thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A). Thus, revocation of parole leads to a separate proceeding to determine removal for inadmissibility, although the same grounds may lead to both revocation of parole and removal. 8 U.S.C. § 1229a.

Once the removal order becomes final, the Attorney General is charged with effecting the alien's removal within 90 days. 8 U.S.C. § 1231(a)(1). Failing that, the form of release authorized under sections 1231(a)(3) and (6) is release on supervision. Such release does not change the alien's legal status. The *Zadvydas* Court recognized this distinction in stating that the issue was not one of conferring on aliens ordered removed a right to be admitted but to release on conditions from indefinite detention. 533 U.S. at 695. The government's use of parole confuses the procedures for allowing aliens into the country with the procedures for removing them from the country.

B. The Historical Context of the Freedom Flotilla Does Not Warrant Special Indefinite Detention for Mariel Cubans.

In 1980, the United States witnessed the migration of thousands of Cubans seeking asylum. Contrary to government's assertions, these individuals were not attempting

to enter the United States illegally. (Br. for Pet'rs at 7.) The Cubans were responding to the invitation of the United States to provide safe harbor from a repressive Communist regime following an announcement by Castro that those who wanted to leave could do so from Mariel Harbor.

President Carter announced on April 14, 1980, that the United States would admit as refugees up to 3,500 of the more than 10,000 Cubans who had taken sanctuary in the Peruvian Embassy in Havana, Cuba. The newly amended provisions of 8 U.S.C. § 1157(b) (Supp. V 1981) provided for admission of refugees in response to an unforseen emergency situation and set aside $4.25 million for resettlement assistance.[3] Flights began to evacuate the refugees to Costa Rica where their requests for admission would be processed.

Two days later, Castro suspended the airlift and announced that Cubans in Florida could send boats to retrieve their relatives from Mariel Harbor. The first boats containing Cuban refugees arrived in Key West on April 21, 1980. ALEX LARZELERE, THE 1980 CUBAN BOATLIFT: CASTRO'S PLOY – AMERICA'S DILEMMA 122-24 (1988). Upon arrival, the Immigration and Naturalization Service allowed the refugees to land and began processing them for resettlement and releasing them to family members and relief agencies. Because they arrived without visas, the refugees were paroled into the United States under section 1182(d)(5).

The number of Cubans who left by boat to seek asylum in the United States far exceeded both President Carter's expectations and the annual immigration quotas. In a memorandum to the Secretary of State on May 1, 1980, the President announced that 9,000 Cubans had been admitted as refugees, and authorized the admission of an additional 10,500 refugees under 8 U.S.C. § 1157(b)

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[3] *See* Pres. Determ. No. 80-161; 45 Fed. Reg. 28,079 (April 14, 1980); Cuban Refugees in the Peruvian Embassy in Havana, PUB. PAPERS 689 (April 14, 1980).

during the remainder of the fiscal year. Pres. Determ. No. 80-17; 45 Fed. Reg. 29,785 (May 1, 1980).[4]

The President indicated government approval of the flotilla at a press conference in Miami on May 5, 1980:

> [L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. . . . But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

President Carter's Speech of May 5, 1980, as quoted in *United States v. Frade*, 709 F.2d 1387, 1395 (11th Cir. 1983). When the number of refugees topped 40,000 on May 14, 1980, the Carter Administration issued a new policy. For the first time, Cubans would have to be screened before departing Cuba. Cuban Refugees, PUB. PAPERS 912-16 (May 14, 1980). Screening procedures broke down, however, and on May 20, 1980, the White House announced that "Cubans arriving in Florida would be treated as applicants for asylum, not as refugees." Robert Pear, *President to Treat Cubans as Applicants for Asylum*, N.Y. TIMES, May 21, 1980, at A24. *See* Cuban Asylees, PUB. PAPERS 990 (May 29, 1980) (describing Cubans as asylees).

On June 20, 1980, the Administration declared that "Cubans who have arrived in the United States during the

[4] Since 1981, the United States has followed an effective if controversial policy of interdiction and offshore screening to avert mass migration into this country. U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 169-170 (1994). In 1994, the United States and Cuba established migration accords to promote legal, orderly migration between the two countries. The United States agreed to provide at least 20,000 visas to Cubans annually in return for Cuba's discouragement of unsafe migration attempts. U.S.-Cuba Joint Communique on Migration, Sept. 9, 1994, DEP'T ST. DISPATCH, Sept. 12, 1994, Vol. 5, No. 7, at 603.

period April 21-June 19, 1980, and who are in I.N.S. Proceedings as of June 19, 1980, and all Haitians . . . will have their parole into the country renewed for a six-month period as 'Cuban/Haitian Entrants (status pending)'." Special to the New York Times, *Text of State Dept. Statement on a Refugee Policy*, N.Y. TIMES, June 21, 1980, at 8. This newly-created status allowed the President to circumvent the annual refugee quotas that Congress had established and to avoid the restrictions on the use of parole to admit refugees imposed by the newly-enacted Refugee Act of 1980. 8 U.S.C. § 1159 (Sipp. V 1981).[5]

Ultimately, more than 125,000 Cubans emigrated to the United States in 1980 during the Freedom Flotilla from Mariel Harbor. Although they were "paroled" rather than "admitted," these individuals enjoyed refugee treatment, if not formal refugee status. They were not detained pending exclusion proceedings, but were immediately processed for resettlement, received government benefits, and were the beneficiaries of special legislation to adjust to lawful permanent resident status. *E.g.*, Refugee Education Assistance Act, Pub. L. No. 96-422, § 501, 94 Stat. 1799, 1809-10 (Oct. 10, 1980) (codified at 8 U.S.C. § 1522 (Supp. V 1981)); Immigration Reform & Control Act, Title II, § 202, Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, 100 Stat. 3359, 3404 (1986). *See generally* Br. of the Florida Immigrant Advocacy Center and Rafael Peñalver as *Amici Curiae*; *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004); Br. of National Refugee Resettlement and Advocacy Organizations as *Amici Curiae* in Support of Respondent Martinez (Refugee Resettlement Agencies' *Amicus* Brief (U.S. filed Aug. 2, 2004)).

In the ensuing years, the United States was faced with the problem of administering a small but growing population of Cuban citizens who had been ordered deported, but whom Cuba would not accept. Except for a minor

[5] For the fiscal year 1980, Congress set the overall immigration quota at 270,000 visas and added to this number an additional 50,000 visas for refugees, which included 5,000 for asylees.

exception in 1984, Cuba has refused to repatriate either the small number of Mariel Cubans who were found excludable upon their seeking entry or those whose parole was later revoked as a result of crimes committed in the United States.[6] After a failed attempt to reinstate the 1984 agreement, the Justice Department created a subcategory for "Mariel Cubans" and the Cuban Review Panel, to consider parole. 8 C.F.R. § 212.12 (1988); 52 Fed. Reg. 48,802 (Dec. 28, 1987).[7] The government's indefinite detention policy affects Mariel Cubans who remain imprisoned although they have long-since completed serving criminal sentences. The policy also affects citizens of other countries with whom the United States does not have repatriation agreements.

Indefinite detention for Mariel Cubans ordered removed is harsh. The government claims the prospect of detention for life is merely a "spectre." (Br. for Pet'rs at 48.) But Hector Peñalver spent the remainder of his life in immigration detention. Shortly after he petitioned for habeas corpus relief in the district of Oregon in 2001, Mr. Peñalver died at the age of 47 in a federal prison cell, having spent the last six years in immigration detention

[6] On December 14, 1984, the United States and Cuba agreed that Cuba would receive 2,746 of these Mariel Cubans at the rate of approximately 100 per month. In exchange, the United States would accept approximately 20,000 Cubans, including 3,000 political prisoners. In the next six months, 201 excluded Mariel Cubans were returned to Cuba, with at least 73 of these Cubans being re-imprisoned upon their arrival. Castro suspended the 1984 agreement when relations between the United States and Cuba broke down. *See Fernandez-Roque v. Smith*, 600 F. Supp. 1500, 1501 n.2 (N.D. Ga. 1985); *see also Rodriguez v. Thornburgh*, 831 F. Supp. 810, 811 (D. Kan. 1993); *Perez v. Neubert*, 611 F. Supp. 830, 832-33 (D.N.J. 1985).

[7] Separate regulations applied to all other aliens ordered removed – whether based on grounds of inadmissibility or deportability – including Cubans who were paroled into the United States before or after 1980. 8 C.F.R. § 241 (2004). These regulations do not apply to aliens apprehended at the border even if paroled into the country. 8 C.F.R. §§ 241.13(b)(3)(I) and 241.3(a).

awaiting removal to Cuba. He had been among those who sought asylum in the Peruvian Embassy in Havana. *Peñalver v. Smith*, CV 3-01-00250-PA (D. Or. 2001). The 25 Mariel Cubans detained in the District of Oregon who sued for release spent a total of more than 134 years in immigration detention awaiting removal. One had been detained for more than 17 years before the district court granted habeas relief. *Céspedes-León v. Smith*, CV 3-01-00371-PA (D. Or. 2003). Several had been detained 10 years or more. *Arano-Alemán v. Smith*, CV 3-01-00370-PA (D. Or. 2003) (10 years); *Vigil-Hernández v. Smith*, CV 3-01-00378-PA (D. Or. 2003) (11 years); *Zayas v. Smith*, CV 3-01-00381-PA (D. Or. 2003) (10 years). The prospect of indefinite, potentially permanent, detention is no mere spectre. *See generally* Brief of American Bar Association as *Amicus Curiae*, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (ABA *Amicus* Brief); Brief of Religious Organizations as *Amici Curiae* in Support of Respondent Martinez (U.S. filed Aug. 2, 2004).

C. Mr. Martinez Was Paroled into the United States in 1980 and Received a Final Removal Order in 2001.

At the age of 25, Mr. Martinez fled Cuba by boat and arrived in the United States on June 8, 1980. (Gov't Mot. for Extension of Time (Gov't Mot. Extension) at 3.) He was paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) and eventually settled in Fresno, California, where his daughter, a United States citizen, still resides. (*Id.*; Certified Administrative Record (CAR) at A-000150.) In 1991, the government denied Mr. Martinez's application to adjust his status to lawful permanent resident because of criminal conduct. (Gov't Mot. Extension at 3.) The order denying Mr. Martinez's application stated: "Applicant will continue in status as an alien paroled into the United States pending resolution of the matters pertinent to his arrival in the United States." (Pet'r Ex. to Pet. for Writ of Habeas Corpus (Pet'r Ex.) at A-000074.)

Following three criminal convictions for petty theft, burglary, and attempted sex abuse, the government

revoked Mr. Martinez's immigration parole on December 28, 2000. (Gov't Mot. Extension at 3.) The notice of parole revocation invoked 8 U.S.C. § 1182(d)(5) and instructed: "[Y]our parole status is being revoked and . . . you will be placed in Removal Proceedings." (Pet'r Ex. at A-000070.) The government took Mr. Martinez into custody "pursuant to the authority contained in section 236 of the Immigration and Naturalization Act [8 U.S.C. § 1226]." (CAR at A-000100.) The government alleged as grounds for removal the failure to possess a valid visa, permit, entry document, or other suitable travel document, in addition to criminal conduct. (Gov't Supplemental Mot. to Hold in Abeyance, Attach. A at 4.)

The removal proceedings held on January 24, 2001, pursuant to 8 U.S.C. § 1229a, resulted in a final order that Mr. Martinez be removed from the United States to Cuba. Mr. Martinez consented to removal, did not seek protection under the Convention Against Torture, and did not appeal the removal order. Although there was no prospect of removal to Cuba, Mr. Martinez remained in immigration detention. On February 8, 2001, the government made an internal request that travel documents be obtained for Mr. Martinez (Pet'r Ex. at A-000157-164), but no such request was made of Cuba or any other country.

Mr. Martinez was interviewed twice by the Cuban Review Panel while at United States Penitentiary Terre Haute, first on May 1, 2001, and again on March 15, 2002. On both occasions, the Panel denied release based on his prior criminal behavior, although the second Panel acknowledged he was presently non-violent. (CAR at A-000139-43.) Following the March 2002 interview, Mr. Martinez was transferred to a medium security federal prison in Oregon – Federal Correctional Institution Sheridan – to await removal to Cuba.

D. The District Court Granted Mr. Martinez Release Subject to Conditions Based on Section 1231(a)(6)'s Uniform Treatment of Inadmissible and Deportable Aliens.

On July 19, 2002, Mr. Martinez sued for habeas corpus relief under 28 U.S.C. § 2241 (2000), challenging his indefinite detention as a result of the government's inability to remove him to Cuba. (Pet. for Writ of Habeas Corpus.) Mr. Martinez also raised a procedural due process challenge to the Cuban Review Plan. Upon the issuance of *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), on August 1, 2002, the government moved to stay Mr. Martinez's petition while it sought rehearing *en banc*. (Gov't Supp. Mot. to Hold in Abeyance.) In its motion, the government conceded 8 U.S.C. § 1231(a)(6) provided the legal basis for detaining Mr. Martinez. (*Id.* at 4.)

In *Lin Guo Xi*, the Ninth Circuit, employing traditional canons of statutory construction, looked to the language of section 1231(a)(6) and concluded that the statute expressly applies to both inadmissible aliens and aliens removable by deportation. *Lin Guo Xi*, 298 F.3d at 835-36. The court rejected the government's argument that the statute should be construed differently depending upon the category into which the alien fell. The Ninth Circuit found that the plain language of the statute forbids such a "bifurcated construction," and that such an approach would be "untenable." *Lin Guo Xi*, 298 F.3d at 836-37. The court concluded that "the clear text of the statute, coupled with the Supreme Court's categorical interpretation, leaves us with little choice but to conclude that *Zadvydas* applies to inadmissible individuals." *Lin Guo Xi*, 298 F.3d at 836.

On September 18, 2002, over Mr. Martinez's objection, the district court stayed the petition for 30 days. (R. of Hr'g (Sept. 18, 2002).) When the Ninth Circuit denied the government's petition for rehearing in *Lin Guo Xi*, Mr. Martinez, through counsel, immediately moved for an order dissolving the stay and directing the government to release him from indefinite detention because repatriation to Cuba was not foreseeable. (Pet'r Mot. for Order Dissolving Stay

and Directing the INS to Release Him from Indefinite Detention.) After further briefing and a hearing on October 28, 2002, the district court ordered Mr. Martinez released on conditions:

> [Martinez's] motion to dissolve stay and for immediate release is granted. Respondent's motion to hold proceedings in abeyance is denied. The petition for habeas corpus relief is granted. Respondents are ordered to release [Martinez] immediately subject to reasonable conditions.

(Order (Oct. 30, 2002).) Having granted relief on statutory grounds, the court did not reach the constitutional merits of indefinite detention or the procedural due process claim.

Instead of releasing him, the government moved Mr. Martinez to a county jail in rural Oregon, where detainees were forced to sleep on floors without blankets, socks, or underwear. (Pet'r Mot. for Order to Show Cause at 2.) The government then set conditions of release that included a $7,500 bond that Mr. Martinez had no means to meet. The government did not interview Mr. Martinez to assess his ability to post a bond or to determine what conditions of release would be appropriate before setting them. Not until December 23, 2002, did the government interview Mr. Martinez and conclude he was unable to post any amount of bond. (Pet'r Status Report at 2-3.) In April 2003, the government transferred Mr. Martinez to a halfway house, from which he was later released. (Pet'r Notice of Mootness at 1.)

Although the government appealed the conditional release order, it sought and received a stay of the briefing, but not of the release order, pending the disposition of its petition for certiorari regarding the application of section 1231(a)(6) to inadmissible aliens in *Rosales-Garcia v. Holland*, 322 F.3d 386 (6th Cir. 2003), *cert. denied sub nom. Snyder v. Rosales-Garcia*, 539 U.S. 941 (2003). Following the denial of that petition, and the government's decision not to petition this Court to review *Lin Guo Xi*, Mr. Martinez moved for summary affirmance. (Mot. Summ. Affirmance.) The government's response again

acknowledged that *Lin Guo Xi* controlled and requested summary disposition as well. (Resp. to Mot. for Summ. Affirmance at 6.) The Ninth Circuit affirmed. (Order (Aug. 18, 2003).) On March 1, 2004, this Court granted certiorari.

SUMMARY OF ARGUMENT

The text of section 1231(a)(6) treats deportable aliens and inadmissible aliens in the same manner. Upon the entry of a final order of removal, both inadmissible and deportable aliens are in the same legal position. *Zadvydas* construes the statutory language to limit the period of detention of aliens removable for deportability, and the same statutory language means the same thing for aliens removable for inadmissibility.

The statutory structure of the immigration laws strongly supports this construction. Mariel Cubans are in the same category of inadmissible aliens that encompasses a broad range of other aliens, including those who entered without permission or who are inadmissible for a myriad of reasons unrelated to criminal convictions. By adopting a single removal proceeding for both inadmissible and deportable aliens, Congress eliminated any reason for distinguishing post-removal-period detention of those removable as inadmissible from that of those removable as deportable. No precedent warrants judicial fragmentation of the post-removal-period detention statute to interpret the statute differently according to the alien's former legal status. That status has been extinguished in the proceedings leading to the removal order.

Section 1231's uniform treatment of aliens who have been ordered removed is especially highlighted by Congress' explicit law on indefinite detention of those presenting national security risks. Unlike section 1231(a)(6), section 1226a explicitly authorizes indefinite detention and sets out procedures for such an extreme measure. In contrast, neither the text of section 1231(a)(6) nor its legislative history reflects an intention to authorize indefinite detention of any class of aliens.

Reliance on the government's parole authority is misplaced. Section 1182(d)(5) is a release – not a detention – statute. When parole is terminated or revoked, the statute explicitly refers to the statute relating to the admission and removal processes. Moreover, the government has mischaracterized Mr. Martinez's claim as one for admission when in fact he requested only release pending removal.

The government basically argues to the Court a policy that Congress has never adopted: that one class of inadmissible aliens should be subjected to different and harsher post-removal-period detention, which could include life imprisonment. This argument finds no support in the text or structure of the statute. Regardless of the many reasons such disparate treatment would be bad policy, the argument is one for Congress, not the Court.

Even if resort to the doctrine of constitutional avoidance were necessary, Mr. Martinez's indefinite detention would raise grave constitutional concerns under substantive and procedural due process. The Sixth Circuit *en banc* found that indefinite detention of inadmissible aliens would violate substantive due process. The government's position that Mr. Martinez is not a person and therefore has no interest in avoiding indefinite detention is contradicted by solid precedent placing human liberty as the highest of values. "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The authority upon which the government relies has been superseded by statute. While severe limits on formal admission may apply, even to a man who has sojourned in this country for 24 years, Mr. Martinez cannot be detained indefinitely without the procedural and substantive protections that apply to all persons.

ARGUMENT

I. BECAUSE THE STATUTE TREATS BOTH CATEGORIES OF ALIENS IN THE SAME MANNER, THIS COURT'S CONSTRUCTION OF 8 U.S.C. § 1231(a)(6) IN *ZADVYDAS* TO PRECLUDE INDEFINITE DETENTION OF DEPORTABLE ALIENS REQUIRES THE SAME CONSTRUCTION OF THE STATUTE TO PRECLUDE INDEFINITE DETENTION OF INADMISSIBLE ALIENS.

Mr. Martinez was released from indefinite detention on supervision because the district court and the Ninth Circuit followed the language of section 1231(a)(6) and the precedent of *Zadvydas*. Mr. Martinez is in the statutory class of inadmissible aliens that section 1231(a)(6) treats in the same manner as aliens removable due to deportability such as Messrs. Zadvydas and Ma. Because *Zadvydas* authoritatively construed section 1231(a)(6) to limit detention for purposes of removal when a deportable alien cannot be removed within the reasonably foreseeable future, and because the statute treats inadmissible aliens in the same manner as deportable aliens, *stare decisis* requires the application of the *Zadvydas* construction of section 1231(a)(6) to Mr. Martinez. *Lin Guo Xi v. INS*, 298 F.3d 832, 836 (9th Cir. 2002); *accord Rosales-Garcia v. Holland*, 322 F.3d 386, 403-08 (6th Cir. 2003) (*en banc*); *Borrero v. Aljets*, 325 F.3d 1003, 1009 (8th Cir. 2003) (Heany, J., dissenting).

By attempting to frame the issue before the Court as one of admission rather than detention, the government skips much of the decisive statutory construction question concerning detention of inadmissible and deportable aliens for the purpose of removal. As in *Zadvydas*, this case does not involve whether to confer upon aliens a right to admission to the United States but only "whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." 533 U.S. at 695. Because the plain meaning of the clause forming the grammatical subject of

section 1231(a)(6) resolves the case, the Court need not address the constitutional issues surrounding the application of the grammatical predicate to inadmissible aliens. *Zadvydas*, 533 U.S. at 689 ("this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445-46 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (citations omitted)).

A. In 8 U.S.C. § 1231(a)(6), Congress Expressed in Plain Terms That Inadmissible Aliens Are to Receive the Same Treatment as Deportable Aliens.

Because this case calls upon the Court to construe section 1231(a)(6), the language of the statute itself provides the starting point. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). The statutory text of section 1231(a)(6) requires that an inadmissible alien be treated in the same manner as a deportable alien after the expiration of the removal period.

1. The Plain Language of the Statute Requires Equal Treatment of Both Inadmissible and Deportable Aliens.

In the plain words of the text, Congress has unequivocally answered the question whether deportable and inadmissible aliens should be treated in the same manner: the parallel structure of section 1231(a)(6) allows no distinction among classes of aliens. The grammatical subject of the sentence sets out two adjectival clauses that describe groups who are subject to the same predicate:

> An alien ordered removed who is [1] inadmissible under section 1182 of this title, [2] [or] removable under section 1227(a)(1)(c), 1227(a)(2), or 1227(a)(4) of this title or. . . .

8 U.S.C. § 1231(a)(6) (bracketed inserts from *Zadvydas*, 533 U.S. at 682). Section 1182 describes inadmissible aliens, and section 1227 describes deportable aliens. The plain meaning of the statute is that the designated groups are subject to the same predicate – the detention provision this Court construed in *Zadvydas*. *See Ron Pair Enterprises*, 489 U.S. at 241 (statute's meaning was also "mandated by the grammatical structure of the statute").

Because no ambiguity appears in the statute's uniform treatment of the designated groups – aliens who are removable due to inadmissibility and those who are removable due to deportability – "judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Garcia v. United States*, 469 U.S. 70, 75 (1984) (quoting *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). In the absence of an exception in the language of the statute, "the courts can make none." *French's Lessee v. Spencer*, 62 U.S. (21 How.) 228, 238 (1858). Because no extraordinary circumstances warrant deviation from the statute's plain meaning, "the sole function of the courts is to enforce it according to its terms." *Ron Pair Enterprises*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

2. *Zadvydas* Construed the Statute.

Even if the indefinite detention of inadmissible aliens presented no constitutional issue (and it does, *infra* at Point II), the holding of *Zadvydas* was limited to statutory interpretation: "[W]e construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal court review." 533 U.S. at 682. This ruling followed logically from the discussion of the doctrine of constitutional avoidance as an aid in the construction of statutes. *Zadvydas*, 533 U.S. at 689. The Court recognized that the broad scope of the statute encompassed "certain categories of aliens who have been

ordered removed, namely, inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons. . . . " *Zadvydas*, 533 U.S. at 688. The holding interpreted the words of the statute:

> [W]e read an implicit limitation [on the length of detention] into the statute before us. In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.

Zadvydas, 533 U.S. at 689. This holding, coupled with the uniform treatment the removal statute accords deportable and inadmissible aliens, means that the statute does not permit indefinite detention of inadmissible aliens.

The plain text of the statute as interpreted by this Court compels this conclusion even though the Court in *Zadvydas* did not reach the question of the statute's application to aliens who had not yet gained initial entry. 533 U.S. at 682. The Court exercised the jurisprudential restraint that limits decisions to the issues raised in the petition for certiorari. SUP. CT. RULE 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Lopez v. Davis*, 531 U.S. 230, 241 n.6 (2001). Nonetheless, the inexorable application of *Zadvydas* to inadmissible aliens not only inhered in the majority's opinion, Justice Kennedy explicitly recognized it in dissent: "[I]t is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of this possibility." *Zadvydas*, 533 U.S. at 710. Now with the question squarely before the Court, the statute permits a single construction: both classes of aliens are subject to the same grammatical predicate this Court construed in *Zadvydas*.

3. Statutory Construction Does Not Permit Varying Interpretations Depending on the Canon of Construction Applied.

The avoidance of constitutional doubt is a well-established rule to assist in the construction of statutory language. *See, e.g., Zadvydas*, 533 U.S. at 689 (citing cases); *Jones v. United States*, 526 U.S. 227, 239-40 (1999) (citing cases). "Out of respect for Congress," the Court "assume[s] legislation is written in light of constitutional limitations." *Jones*, 526 U.S. at 240 (quoting *Rust v. Sullivan*, 500 U.S. 173, 191 (1991)).

The government has offered no precedent that permits courts to vary the construction of the same statutory language depending on the applicable canon of statutory construction, nor is there precedent that allows the doctrine of constitutional avoidance to fragment a statute by judicial construction.[6] The suggestion that the term construed in *Zadvydas* has a different meaning for different classes in the statute runs counter to the rule requiring intra-statutory consistency. *See* Br. of American Civil Liberties Union as *Amicus Curiae*, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (ACLU *Amicus* Brief) (demonstrating that government's approach will embroil the courts in continual and unnecessary constitutional adjudication).

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[6] The only cases the government offers do not involve ascribing different meanings for the same words in a statute. (Br. for Pet'rs at 29.) In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court qualified by construction the words "full power to hear and determine all questions" in maritime employment compensation claims to cover the determination of only non-jurisdictional facts by the administrative agency. 285 U.S. at 62. The statute meant the same thing for all claimants, with the same qualification that the courts would ultimately decide whether the claim was within the agency's jurisdiction to determine. Further, the Petitioner's reliance on *Lane v. Pena*, 518 U.S. 187 (1996), is misplaced because that case did not involve constitutional avoidance, the statutory language was contained in two separate statutes, not the same language in the same sentence, and the case involved the requirement of express waiver of sovereign immunity, which was lacking.

Because "identical words used in different parts of the same act are intended to have the same meaning," *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986)), the identical words in the same sentence of a statute must also be given the same meaning. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (the rule of intra-statutory consistency is "at its most vigorous when a term is repeated within a given sentence"); *see Rasul v. Bush*, 124 S.Ct. 2686, 2696 (2004) ("Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."). The government admitted as much in its briefing in *Zadvydas* and its companion case, when it recognized "the unambiguous intent of Congress that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6)." Brief for Petitioner, at 46, *Ashcroft v. Ma*, No. 00-38 (U.S. filed June 28, 2001).[9] This case requires only the logical application of controlling precedent to a parallel group listed in the same statute.

[9] This recognition of the uniform statutory treatment of removable aliens under the post-removal-period detention statute was not an isolated admission: "[W]here Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category"; "Congress made no distinction between aliens who have resided in this country, regardless of how long, and aliens who have never resided here, when it authorized the Attorney General to detain beyond the removal period"; and "in IIRIRA, Congress took a significant step toward eliminating distinctions between the treatment of resident aliens and aliens applying for admission when it created one new proceeding, termed a 'removal' proceeding, in which to determine both expulsion and exclusion cases, replacing the formerly distinct deportation and exclusion proceedings." *See* Brief for Petitioner, *Ashcroft v. Ma*, No. 00-38, at 17 and 47; Brief for Respondent, *Zadvydas v. Davis*, No. 99-7791, at 14 (U.S. filed Jan. 5, 2001).

4. Under the Doctrine of *Stare Decisis*, *Zadvydas* Controls the Meaning of the Predicate Clause of the Statute.

The doctrine of *stare decisis* controls this case. In *Zadvydas*, the Court interpreted a particular phrase in the relevant statute: "may be detained beyond the removal period." 533 U.S. at 688-89, 699. Therefore, the meaning of that phrase construed in *Zadvydas* should be construed identically in the present case. *United States v. Wells*, 519 U.S. 482, 495 (1997) (there is a presumption "that Congress expects its statutes to be read in conformity with this Court's precedents."). This is especially true where Congress, subsequent to *Zadvydas*'s interpretation, explicitly authorized indefinite detention in national security cases. 8 U.S.C. § 1226a.

B. The Statutory Context Supports the Plain Terms of the Statute and Contradicts the Government's Arguments.

Context also provides statutory meaning. *Hibbs v. Winn*, 124 S.Ct. 2276, 2285 (2004); *Bailey v. United States*, 516 U.S. 137, 145 (1995). Here, the statutory context bolsters the conclusion that the detention statute treats inadmissible and deportable aliens identically. IIRIRA eliminated the category of "excludable" aliens and instead moved that class of aliens into the same category of inadmissible aliens as those who entered without inspection, among others. 8 U.S.C. § 1182(a). The post-removal-period detention of this broad class of inadmissible aliens does not trigger the concerns raised by the government's policy arguments any more than does the post-removal-period detention of the class of aliens removable by deportation. Further, subsequent legislation specifically provided for indefinite detention of aliens who present security risks in explicit terms entirely absent from section 1231(a)(6). The statutory context supports equal treatment for inadmissible and deportable aliens and undercuts disparate treatment for aliens formerly termed excludable.

1. The Statutory Context Provides No Basis for Disparate Treatment of Deportable and Inadmissible Aliens under the Detention Statute.

The statutory context demonstrates that, under section 1231(a)(6), Congress intended uniform treatment of removable aliens, whether the alien is deportable or inadmissible. Once they are subject to a final removal order, all aliens, regardless of their prior status, have had their right to remain in the United States extinguished. The government's statutory analysis is flawed by its reliance on four categories of aliens that are irrelevant under section 1231(a)(6): permanent residents, non-immigrants, those who enter without inspection, and those stopped at the border seeking admission. (Br. for Pet'rs at 2.) Aliens formerly admitted as permanent residents and non-immigrants, who, for whatever reason – including criminal conduct – are subject to removal orders, have been categorized by Congress without such distinctions under the second prong of section 1231(a)(6). 8 U.S.C. §§ 1227 and 1229a. Aliens who have been stopped at the border and those who entered without inspection, once ordered removed, are also categorized without distinction under the first prong of section 1231(a)(6). Both groups are subject to the same detention provisions after the expiration of the removal period.

Congress did not authorize indefinite detention except in the context of national security. Nor did it authorize different detention practices for different categories of aliens ordered removed. The government's claim that deference to the "political Branches" requires indefinite detention for Mr. Martinez and thousands of others finds no textual support. By seeking to carve out an exception for those aliens removable due to "excludability" where none exists in the statute, the Executive Branch is failing to carry out the statute enacted by the Legislative Branch, as it has been interpreted by the Judicial Branch. *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and

laws of the United States is received by all as the true construction. . . . "); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("It is this Court's responsibility to say what a statute means. . . . A judicial construction of a statute is an authoritative statement of what the statute mean[s]. . . . "). The structure of the statute does not permit disparate treatment of inadmissible and deportable aliens who have been ordered removed.

2. The Subsequent Amendment of the Immigration and Nationality Act to Authorize Detention of Aliens Who Present Risks to National Security Supports Application of *Zadvydas* to Both Deportable and Inadmissible Aliens.

After September 11th, Congress amended the INA to provide expressly for prolonged detention of aliens who constitute national security risks. 8 U.S.C. § 1226a(a)(6). Viewed in the context of this subsequent legislation, Congress harbored no intention of treating inadmissible aliens differently from deportable aliens under section 1231(a)(6).

In section 1226a, Congress continued to treat removable aliens – whether inadmissible or deportable – as the relevant category, with no indication that aliens formerly termed "excludable" are subject to different treatment. Congress carefully elided subsection (ii) from the reference to section 1182(a)(3)(A), which excluded inadmissible aliens in the category of aliens who sought to enter to engage in "any other unlawful activity," so common criminals do not generally fall subject to indefinite detention.[10] The procedural protections – as scant as they may be – show that Congress, when contemplating the radical and harsh possibility of indefinite detention, provides some

[10] Subsection (ii) on "other unlawful activity" is sandwiched between subsection (i), which relates to espionage and sabotage, and (iii), which relates to sedition.

standards and review. 8 U.S.C. § 1226a(a)(7), (b). Section 1231(a)(6) contains no such protections.

Congress could not have intended that, of all removable aliens, only Mariel Cubans would have fewer protections than terrorists and security risks. If inadmissible aliens were already statutorily subject to indefinite detention, Congress would have fashioned section 1226a in a manner that recognized that a broader class of inadmissible aliens was already facing such a fate without the statute. When a statute is amended, as with section 1226a, this Court presumes Congress intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 397 (1995); *see Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (the Court avoids a statutory construction that would render another part of the same statute superfluous). The explicit reference in section 1226a to indefinite detention – with language reflecting awareness of *Zadvydas* – and the absence of any comparable language in section 1231(a)(6), demonstrates Congress' awareness and intention that only section 1226a authorized indefinite detention of a discrete group of which Mr. Martinez is not a member. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*"); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).[11]

[11] Indefinite detention, without express authorization, would be especially anomalous given the definite sentencing guidelines and statutory maxima for aliens who willfully violate conditions of release imposed under section 1231(a)(3) and (6) (maximum one-year sentence) and willfully prevent their departure (maximum 10-year sentence). 8 U.S.C. § 1253(a) & (b) (2000); U.S. SENTENCING GUIDELINES MANUAL App. A (2004); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 (2004).

Congressional concerns regarding foreign or internal dangers short of war may lead to expulsion or detention, regardless of the status the alien formerly held. 8 U.S.C. § 1226a; *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952). Congress has expressly authorized – and provided procedural mechanisms for – indefinite detention for national security purposes in 8 U.S.C. § 1226a when removal is not immediately possible. Regardless of the circumstances of the alien's presence, the government must follow specific procedures before continuing post-removal-period detention beyond six months on the basis of national security concerns. 8 U.S.C. § 1226a(a)(7). *See Zadvydas*, 533 U.S. at 696 (declining to consider "terrorism or other special circumstances where special arguments might be made for forms of preventive detention").[12] The national security concerns reflected in past Court rulings on indefinite detention of aliens are now addressed by statute. *See also* Brief of Eizenstat and Pickering as *Amici Curiae* in Support of Respondent Martinez (U.S. filed Aug. 2, 2004) (Eizenstat *Amici* Brief).

3. The Government's Reliance on the Parole Statute Is Misplaced.

Although the government initially recognized that section 1231(a)(6) was the relevant statute, the government now asserts the parole statute also authorizes indefinite detention. (Br. for Pet'rs at 26-27.) The structure of the statutes demonstrates that parole is distinct from release on supervision under sections 1231(a)(3) and (6). The parole statute provides that, once the purposes of parole have been satisfied, "the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for

[12] *See also* 8 U.S.C. § 1537(c) (2000) (providing for post-removal-period detention of terrorist aliens whose repatriation is not possible, setting reviews every six months, and instructing agency to make efforts for removal to third countries).

admission to the United States." 8 U.S.C. § 1182(d)(5)(A). Thus, return to custody under section 1182(d)(5)(A) triggers 8 U.S.C. § 1225 (2000) and 8 U.S.C. § 1226 (2000), which provide for the inspection, apprehension, and detention of applicants for admission.[13] Such applicants are then subject to a removal hearing under section 1229a and, if ordered removed for inadmissibility, subject to post-removal-period detention and release under section 1231.

Because the parole statute explicitly directs that further detention is controlled by section 1226, which provides for the apprehension and detention of applicants for admission, and not section 1182(d)(5), further detention upon entry of a removal order is authorized only by section 1231. Post-removal-period detention under section 1182(d)(5) would render meaningless the statutory language "thereafter . . . shall continue to be dealt with in same manner as any other applicant."[14]

[13] This Court in *DeMore v. Kim*, 538 U.S. 510 (2003), considered 8 U.S.C. § 1226(c), which provides for detention without bond of certain categories of aliens during the pendency of removal proceedings against them. The Court noted the statute does not allow for indefinite detention of aliens because removal proceedings have a finite duration, in contrast to the post-removal-period detention considered in *Zadvydas*. *Kim*, 538 U.S. at 529 (citing *Zadvydas*, 533 U.S. at 697 ("post-removal-period detention, unlike detention pending a determination of removability or during the subsequent 90-day removal period, has no obvious termination point")). *Kim* reinforces that, after the removal order, the relevant detention statute is not the parole statute but the post-removal-period statute.

[14] The government similarly misplaces reliance on section 1231(h) (Br. for Pet'rs at 25), which this Court has previously noted is a limitation on private rights of action that "does not deprive an alien of the right to rely on 28 U.S.C. § 2241 to challenge detention that is without statutory authority." *Zadvydas*, 533 U.S. at 688.

C. Although the Statute Does Not Suffer from Any Ambiguity, the Legislative History Betrays No Intention Contrary to the Uniform Treatment Compelled by the Face of the Statute.

In the absence of ambiguity, there need be no resort to legislative history. *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 132-33 (2002). The detention statute unambiguously treats removable aliens, whether inadmissible or removable by deportation, in exactly the same manner. The legislative history does not support different treatment for formerly "excludable" aliens from the protections afforded aliens removable for deportability. Further, the government's reliance on a generalized hostility to Mariel Cubans and those similarly situated is misplaced.

This Court's previous exploration of the legislative history of section 1231(a)(6) found there was "nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." *Zadvydas*, 533 U.S. at 699. Likewise, no legislative history illuminates the indefinite detention of inadmissible aliens.

The government's legislative history argument, contradicted as it is by its position in *Zadvydas* that the statute unambiguously treated inadmissible and deportable aliens the same (*see supra* at Part I.A.2), demonstrates the pitfalls of venturing beyond the statutory language. The government argues that the purpose behind IIRIRA was "to combat the growing problem of criminal recidivism by aliens and to diminish the rights of aliens who have illegally entered the country." (Br. for Pet'rs at 30.) The government cites no direct legislative history to support this characterization, but invokes the spirit of the legislative history to support its position. In fact, the legislative history is silent on the issue before the

Court, but Congress' general intention is less helpful to the government's view than it claims.[15]

The House version of IIRIRA included a statement of goals aimed at reform and illegal entry to the United States: "to improve deterrence of illegal immigration to the United States [by various measures], to reform the legal immigration system and facilitate legal entries into the United States, and for other purposes." *E.g.*, H.R. CONF. REP. NO. 104-828, at 1 (1996); H.R. REP. NO. 104-469, at 1 (2d Sess. 1996). Similarly, the Senate version of IIRIRA purported to "increase control over immigration to the United States by [various measures]; reduce the use of welfare by aliens; and [serve] other purposes." S. REP. NO. 104-249, at 1 (1996). IIRIRA's changes to the criminal penalties and the class subject to such penalties reflect congressional concern with illegal entry, not with problems with repatriation.[16]

The legislation, beyond the post-removal-period statute, does not otherwise address the detention period, the duration of detention after the removal period, the entry fiction, or the detention of inadmissible rather than deportable aliens. Nothing supports the government's

[15] Although the government claims a passage from a House Report supports general increased detention (Br. for Pet'rs at 31), reinsertion of the material elided from the sentence demonstrates that only detention in the 90-day removal period was addressed, the purpose of which was to assure removal: "The reforms thus required increased detention of aliens who are ordered removed, *and for removal to be completed within 90 days of a final order of removal*." H.R. REP. No. 879 at 108, 104th Cong. 2d Sess. 105 (1997) (previously elided phrase italicized). No reference is made to the situation here, where removal is not reasonably foreseeable and the detention is no longer for the purpose of ensuring removal.

[16] *See, e.g.*, 8 U.S.C. § 1326(b)(4) (2000) (imposing fines and/or imprisonment of up to ten years for reentry of nonviolent offenders removed prior to completion of their sentence); 8 U.S.C. § 1324(a)(1)(A)(v) (2000) (broadening the class subject to criminal sanction under section 1324 to include those who engage in conspiracy to smuggle aliens or aid or abet alien smuggling); 8 U.S.C. § 1324c(e) (2000) (imposing criminal penalties for failure to disclose role as preparer of false application or document).

claim of generalized hostility to aliens' rights in this legislation. Moreover, even if supported, this claim cannot serve as an appropriate guide to the construction of the statute. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

D. If Section 1231(a)(6) Were Ambiguous as to the Detention of Deportable and Inadmissible Aliens, the Statute Would Be Construed in Favor of the Alien.

If there were ambiguity regarding the uniform treatment of inadmissible and deportable aliens (which there is not), several related rules of construction would require the interpretation of the statute in favor of the alien. First, because the case concerns indefinite detention, the rule of lenity applies, rooted as it is in the "'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes, in* BENCHMARKS 209 (1967))). Second, in the immigration context, including in cases of removal proceedings, the Court has construed ambiguities in favor of the alien. *INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[W]e will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). Third, when a particular interpretation of a statute invokes the outer limits of congressional power, the Court expects a clear indication that Congress intended that result. *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). If there were ambiguity in the statute's requirement that, under the detention statute, all aliens removable due to inadmissibility be treated

the same as all aliens removable due to deportability, each of these rules of construction would require interpretation of the statute in favor of Mr. Martinez and against indefinite detention.

E. Equal Treatment for All Aliens Identified in the Detention Statute Avoids Conflict with Congressional Condemnation of Arbitrary Detention.

Finally, the Court should construe the statute in a manner that avoids unnecessary conflict with the international treaty obligations of the United States. The Congress that promulgated section 1231(a)(6) did so in the context of its previous condemnation of arbitrary detention. In 1992, the Senate ratified the International Covenant on Civil and Political Rights (ICCPR). 138 CONG. REC. S4781-84 (April 2, 1992). Article 9 of the ICCPR provides that "[n]o one shall be subjected to arbitrary arrest or detention." G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (no. 16) at 52, U.N. Doc. A/6316 (1966).

After there has been a determination that removal is not likely to occur in the reasonably foreseeable future, further detention serves no purpose and constitutes arbitrary detention. *See Zadvydas*, 533 U.S. at 691. A construction of section 1231(a)(6) that allows for the indefinite detention of Mr. Martinez, in the absence of express authority such as provided in section 1226a, would run directly counter to congressional commitments to avoid arbitrary detention. "[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).[17]

[17] This concern is heightened in light of the United Nations Working Group on Arbitrary Detention's definition of arbitrary detention as including continued incarceration beyond service of a criminal

(Continued on following page)

Congress' commitment to the law of nations, as manifested by its ratification of the ICCPR, strongly supports construction of the statute to treat removable aliens equally, whether inadmissible or deportable, because a different construction of the statute would subject removable aliens to indefinite detention. *See generally* Br. for the Lawyers Committee for Human Rights, Human Rights Watch, and Amnesty International USA as *Amici Curiae* at 10, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004).

II. IN THE ALTERNATIVE, THE CONSTITUTIONAL DOCTRINE OF AVOIDANCE WOULD REQUIRE THE *ZADVYDAS* CONSTRUCTION OF SECTION 1231(a)(6) BECAUSE INDEFINITE DETENTION OF INADMISSIBLE ALIENS WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS.

The doctrine of constitutional avoidance, which was applied to an alien removable as deportable in *Zadvydas*, requires the same construction of section 1231(a)(6) when the statute is applied to an alien removable as inadmissible. Indefinite detention implicates the Due Process Clause because aliens, regardless of their legal status within the United States, are "persons" within the meaning of the Due Process Clause. By blurring the distinction between the right to formal entry and core rights shared by all persons within the territorial jurisdiction of the United States, the government adopts the extreme and untenable position that aliens formerly denominated excluded – unlike any other category of aliens – lack any substantive due process right to be free from indefinite detention. The grave doubt as to the constitutionality of the statute, if construed to permit indefinite detention of inadmissible aliens, subsumes the merits of constitutional questions.

sentence. Report of the U.N. Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44 (1997).

A. The Government's Claim That Mr. Martinez Lacks Any Protected Liberty Interest Conflicts with Precedent.

The government asserts that "[a]liens stopped at the border and denied admission lack any protected liberty interest in release into the United States." (Br. for Pet'rs at 15.) The government's use of "release into" suggests something more than Mr. Martinez sought. The constitutional question does not hinge on whether Mr. Martinez has a right to admission or parole into the United States, because his request for release on supervision pending removal was not a request for admission or parole into the United States, nor does such release alter his immigration status. Mr. Martinez sought only release on supervision from indefinite, potentially permanent, incarceration. As the Court noted in *Zadvydas*, the question is not whether the alien has a right to admission, but whether aliens are subject to indefinite imprisonment where removal cannot be accomplished. 533 U.S. at 695.

While aliens subject to removal orders do not, and need not, share equal rights to statutory benefits enjoyed by citizens or even permanent resident aliens, all "persons" enjoy an array of certain core rights protected by the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality."). The basic set of rights thus protected include Fifth and Sixth Amendment trial rights (*Wong Wing v. United States*, 163 U.S. 228 (1896)); access to the writ of habeas corpus (*Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)); equal economic opportunity (*Yick Wo*, 118 U.S. at 369), and protection under the just compensation clause (*Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931)). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country"); *Landon v.*

Plasencia, 459 U.S. 21, 32 (1982) ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly").

To the extent the government is claiming Mr. Martinez lacks "any protected liberty interest," this Court's precedent forecloses such a position. In a case involving Cuban refugees who, like Mr. Martinez, were paroled into the United States, this Court flatly rejected the claim that excludable aliens were not "persons" under the Due Process Clause: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). This Court then recognized and affirmed its long history of according constitutional rights to aliens regardless of their method of entry into the United States. "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments. . . . [W]e have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government." *Plyler*, 457 U.S. at 210 (citations omitted); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) ("The Fifth Amendment, as well as the Fourteenth Amendment, protects every [alien within the territorial jurisdiction of the United States] from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); *see also Rasul*, 124 S.Ct. at 2696 n.8 (recognizing alleged alien enemies as "persons" under 28 U.S.C. § 2241).

Because aliens are persons, they are protected by the Due Process Clause. The Sixth Circuit *en banc* not only found the government's contrary position constitutionally doubtful, the court found it unconstitutional: "[I]t [is] not only unpalatable but also untenable to conclude that under the Due Process Clause of the Fifth Amendment persons living in the United States – whether by our

choice or not – could be subjected to life in prison simply because their country of origin will not have them back." *Rosales-Garcia*, 322 F.3d at 412-13. The court noted the extreme implications of the government's position: "A life sentence in prison, in fact, seems to us no less impermissible than the government's torture or summary execution of these aliens." *Id.* at 413.[18] At best, constitutional doubt is implicated by the indefinite detention of Mr. Martinez for what effectively constitutes a life sentence.

The government's claim that Mr. Martinez can be placed in indefinite detention at the Executive's will, based on the circumstances of his arrival more than 24 years ago, runs contrary to his overwhelming interest in individual liberty and freedom from arbitrary detention: "Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690 (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2661 (2004) (Scalia, J., dissenting).

In the absence of criminal proceedings, or their functional equivalent in the context of dangerous mental illness, the norm is freedom from imprisonment. *United States v. Salerno*, 481 U.S. 739, 749 (1987); *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997). "[G]overnment detention violates [the Due Process Clause] unless the

[18] The radical nature of the government's claim is reflected in footnote 8 of its brief, where the government claims an "excluded alien does not enjoy First Amendment protections." (Br. for Pet'rs at 18 n.8 (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (exclusion of alien anarchists does not violate the First Amendment)).) Once more the government blurs the distinction between formal entry, where an alien's beliefs can be burdened, and core rights of persons within the territory of the United States. Some interests "of transcending value" cannot be compromised. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Zadvydas*, 533 U.S. at 690 (quoting *Foucha*, 504 U.S. at 80) (emphsis in original); *see also Salerno*, 481 U.S. at 746; *Hendricks*, 521 U.S. at 356. Detention does not bear the necessary reasonable relation to the purpose of confinement if the goals of detention are not attainable. *Zadvydas*, 533 U.S. at 690 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)); *see also Hamdi*, 124 S. Ct. at 2461 (prisoners of war must be released upon cessation of active hostilities).

Twenty-four years ago, Mr. Martinez presented himself at the border. Consistent with the government's policy objective of permanent resettlement, he was paroled into the United States where he has lived ever since. He has spent over half his life in the United States, developing the inevitable personal attachments that accompany long-term presence. The decision denying him legal status to remain in the United States occurred in 2001 – after 21 years of lawful presence. The government's characterization of "stopped at the border and denied admission" does not accurately reflect the experience of the individual to whom constitutional principles will be applied. *See* ACLU *Amicus* Brief; Refugee Resettlement Agencies' *Amicus* Brief (arguing that refugee parolees like Respondent have special claim for constitutional protection).

B. Mr. Martinez's Interest Is in Release from Indefinite Detention on Supervision Pending Removal.

Even if indefinite detention were statutorily authorized (which it is not), prolonged and indefinite detention when removal cannot be effectuated violates the Constitution. While the government can detain aliens to remove them, when removal is no longer possible, the impact of such detention exceeds the government's legitimate

interests and constitutes impermissible punishment in violation of the Due Process Clause.

In *Zadvydas*, the Court recognized that the right to freedom from imprisonment is separate and distinct from any right to reside in this country:

> The question before us is not one of 'conferring on those admitted the right to remain against the national will' or 'sufferance of aliens' who should be removed . . . [but] whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

Zadvydas, 533 U.S. at 695 (rejecting government's argument that because aliens with final orders of deportation have no right to "liv[e] at large in this country," they likewise have no liberty interest that is implicated by detention). As in *Zadvydas,* the issue here is not Congress' authority to determine whom it may expel or exclude, but rather the means it has chosen to implement those goals. *See Zadvydas,* 533 U.S. at 695 (emphasizing that "[Congress'] power [to regulate immigration] is subject to important constitutional limitations" and citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983), for the proposition that "Congress must choose 'a constitutionally permissible means of implementing' that power."). Mr. Martinez sought only release from indefinite detention pending removal.

Consistent with this Court's constitutional analysis in *Zadvydas*, an alien's detention must be evaluated in light of the government's regulatory goals. 533 U.S. at 690-91. Mr. Martinez's removal was and continues to be "a remote possibility at best." *Zadvydas*, 533 U.S. at 690. Thus, the government's interest in preventing flight "is weak or nonexistent." *Id*. Furthermore, this Court has consistently held that when "preventive detention is of potentially *indefinite* duration . . . the dangerousness rationale [must] be accompanied by some other special circumstance . . . that helps to create the danger." *Id*. at 691 (citing *Hendricks*, 521 U.S. at 368). In *Zadvydas*, the government

argued that this "special circumstance" was supplied by the detainees' status as aliens who had been ordered removed. *Id*. The Court rejected this argument, emphasizing that "the alien's removable status . . . bears no relation to a detainee's dangerousness." 533 U.S. at 692. Because danger alone is insufficient to justify potentially permanent detention, and because removable status provides no additional basis for such detention, indefinite detention is unconstitutionally excessive.

As this Court recognized in *Zadvydas*, the existence of periodic review procedures does not save detention from being indefinite. 533 U.S. at 691 (characterizing detention as "indefinite" and "potentially permanent," notwithstanding the availability of review procedures). The constitutional deficiency of the Cuban Review Plan is set out *infra* at Point II.D.

C. The Supreme Court's Decision in *Mezei* Does Not Control the Outcome of this Case.

The government broadly interprets *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), to hold that it may detain indefinitely aliens who have not affected an entry, reasoning that aliens standing at the border have no rights. (Br. for Pet'rs at 16-20.) While the Court in *Zadvydas* did not consider the effect of *Mezei* because it found the case distinguishable, *Zadvydas*, 533 U.S. at 693, the government argues that *Mezei* compels indefinite detention for "excludable," as opposed to deportable, aliens who have been ordered removed. (Br. for Pet'rs at 15-20.) *Mezei* is irrelevant to analysis of the post-removal-period detention statute because the factual and statutory contexts are distinct and because the constitutional underpinnings of the ruling no longer exist.

1. *Mezei* Involved National Security, While Mr. Martinez's Indefinite Detention Does Not.

Although Mr. Mezei had previously resided in the United States, the Court treated his landing on Ellis

Island as an attempted initial entry that resulted in permanent exclusion on security grounds. *Mezei*, 345 U.S. at 207. *Mezei* must be viewed in light of the particular national security concerns and the statutory scheme present in that case, both of which are absent here. Mr. Mezei was ordered excluded and detained as a security threat during a presidentially-declared state of emergency under the President's war powers. The holding was narrow: "exclusion without hearing in certain *security cases*" does not violate the Fifth Amendment. *Mezei,* 345 U.S. at 214 (emphasis added).

In *Mezei*, the government's interest in national security was at its apex while Mezei's interest was at its nadir. The Court decided that, given "the times being what they are," it would defer to the executive's authority to "impose additional restrictions on aliens entering or leaving the United States *during periods of international tension and strife*." *Mezei*, 345 U.S. at 216 (emphasis added). The *Mezei* majority accepted at face value the government's classification of Mr. Mezei as a security threat. Courts have generally allowed the Executive an extraordinary amount of leniency during wartime or when national security is truly at stake. *But see Hamdi,* 124 S. Ct. at 2648 (detainee entitled to challenge enemy combatant classification despite detention during wartime). As in *Zadvydas* and in contrast to *Mezei*, no exigencies present themselves here. And where national security is at issue, Congress has now superseded *Mezei* by enacting a statute, complete with procedural protections if the detention exceeds six months. 8 U.S.C. § 1226a.

The government's broad application of *Mezei* to non-national security cases cannot be reconciled with the Court's narrow ruling and its place in history. *Mezei* is a procedural due process case, and as such, there inheres some individual interest at stake, which the *Mezei* Court neither identified nor addressed. Prior decisions clearly established that aliens within the territorial jurisdiction had certain rights that could not be arbitrarily denied. *See, e.g., Yamataya v. Fisher*, 189 U.S. 86, 100 (1903) (alien seeking admission entitled to notice and hearing before

she could be removed); *Chin Yow v. United States*, 208 U.S. 8, 12 (1908) (alien entitled to a "hearing in good faith" in exclusion proceedings); *see* ABA *Amicus* Brief at 8-11. Other than *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the only other case on which *Mezei* relied, *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), recognized an alien's interest in not being removed arbitrarily by providing for judicial review of removal decisions. *See* Eizenstat *Amici* Brief (explaining why government's national security arguments are without merit).

2. *Mezei* Involved an Arriving Alien's Rights in Admission to the United States, While Mr. Martinez Sought Neither Entry Nor Admission, but Release on Conditions from Indefinite Detention.

Although Mr. Mezei asserted "unlawful confinement", the Court in *Mezei* characterized the claim as a request for admission, focusing its analysis on only the procedural due process rights attendant with admission rather than the substantive due process right to freedom from arbitrary and indefinite detention. 345 U.S. at 210. The government incorrectly identifies the right controlled by *Mezei* as a "right to be paroled into the United States, rather than detained." (Br. for Pet'rs at 12.) To the contrary, Mr. Martinez does not claim a statutory or constitutional right to enter the United States. As the Court recognized in *Zadvydas,* the interest asserted is not admission, but freedom from an indefinite term of imprisonment. *Zadvydas*, 533 U.S. at 695. Moreover, Mr. Martinez did not ask to be permanently released "at large" in the United States. Instead, the district court ordered Mr. Martinez's release properly conditioned on compliance with terms of supervision. (Order (Oct. 30, 2002).)

3. Because Mr. Martinez Is Not an Arriving Alien, but Subject to a Final Order of Removal, He Is Not in Ongoing Exclusion Proceedings, Rendering the Entry Fiction Moot.

Mezei justified detention as a necessary component of the continued exclusion process that included application of the entry-fiction. 345 U.S. at 215 (describing detention as "continued exclusion on Ellis Island" but not an entry). Because there was no post-removal-detention statute when *Mezei* was decided, the statutory authority to detain necessarily derived from the authority to detain pending exclusion proceedings. *Mezei*, 345 U.S. at 210-11 (detention during exclusion authorized by the now-repealed Passport Act of 1918). This Court recently distinguished between detention "*pending their removal proceedings*" and post-removal-period detention. *Kim*, 538 U.S. at 527-28. The ongoing nature of the removal proceedings, coupled with their finite duration, made the detention in *Kim* materially different from the indefinite detention at issue in *Zadvydas* and here. *Kim*, 538 U.S. at 527-28. Resort to the "ongoing exclusion proceedings" fiction is no longer necessary because IIRIRA expressly authorizes post-removal-order detention in sections 1231(a)(2) and (6).

Moreover, because *Mezei* involved an arriving rather than a departing alien, the entry-fiction had greater applicability. The entry-fiction is pertinent with respect to the circumstance of an arriving alien who is applying for admission and the rights available in the admission process. The entry-fiction makes sense only with regard to the procedures necessary to prevent entry, as opposed to the procedures necessary to remove a person already in the United States.

4. This Case Does Not Implicate the Political Branches' Plenary Powers over Expulsion or Exclusion.

Mezei reaffirmed the political Branches' primacy over matters pertaining to admission and foreign policy.

Because Mr. Martinez is not requesting admission or challenging the removal order, his conditional release from imprisonment does not imperil the "fundamental sovereign attribute of political Branches to expel or exclude." (Br. for Pet'rs at 16 (citing *Mezei*, 345 U.S. at 210).) The temporal limit on post-removal-period detention of inadmissible aliens awaiting removal neither infringes on the political Branches' power to control immigration nor involves foreign policy considerations. *Zadvydas*, 533 U.S. at 695.

Moreover, release under supervision pending removal is not "compelling those entries in the first place over the express determination of the Executive Branch and Congress that an alien should not be admitted." (Br. for Pet'rs at 38.) The government made the decision to allow Mr. Martinez to resettle in the United States 24 years ago. That decision is not at issue. Nor is the order that he be removed from the United States. Mr. Martinez's release from indefinite detention does not alter the requirement that he return to Cuba, does not constitute an admission or entry, does not change his legal status, and does not allow him to "live at large." *Zadvydas*, 533 U.S. at 696.[19] His conditional release relates only to the means of effectuating the removal order. In rejecting a similar argument, this Court stated that the plenary power to regulate immigration is still subject to constitutional limitations. *Zadvydas*, 533 U.S. at 695 (citing *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) (Congress must choose a constitutionally permissible means of implementing that power)). Despite these limitations, "we nowhere deny the right of Congress to remove aliens, to subject them to conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." *Zadvydas*, 533 U.S. at 695; *see* Eizenstat *Amici* Brief.

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[19] Similarly, the government's choice to release Mr. Martinez under its parole procedures, in the context of post-removal-period supervision, confers no entry rights. The lower court order did not require re-parole, but only release on supervision from detention.

5. Subsequent Developments Have Undermined *Mezei*'s Legal Authority.

Even if *Mezei* were not distinguishable, the decision should not be reaffirmed beyond its narrow facts because subsequent developments in due process jurisprudence render *Mezei* an historic anachronism. Br. of Law Professors as *Amicus Curiae* at 2-3, 17-18, *Benitez v. Mata*, No. 03-7434 (U.S. filed Feb. 25, 2004) (Professors' *Amicus* Brief); ABA *Amicus* Brief at 24-25; see Eizenstat *Amici* Brief (noting that government's national security and border control arguments are particularly weak with respect to parolees like Respondent); ACLU *Amicus* Brief (same). The proposition that the government may detain "completely at the mercy of the unreviewable discretion of the Attorney General," *Mezei*, 345 U.S. at 217 (Black, J. dissenting), has not survived the years. *Rasul*, 124 S. Ct. at 2696 (describing the purpose of the writ of habeas corpus as to review "the legality of Executive detention"); *Hamdi*, 124 S. Ct. at 2648 (due process requires that U.S. citizen who is alleged enemy combatant receive "a fair opportunity to rebut the Government's assertions before a neutral decisionmaker").

Mezei departed significantly from prior caselaw recognizing due process rights for arriving aliens. Prior to *Mezei*, the Court had not held that inadmissible aliens were denied the basic protections of due process. *See, e.g., Chin Yow v. United States*, 208 U.S. 8 (1908) (recognizing right to review of exclusion decision); *Nishimura Ekiu*, 142 U.S. at 660 (determining whether exclusion was in conformity with law). *See generally* Professors' *Amicus* Brief at 9-10; ABA *Amicus* Brief at 8-13.

Mezei itself does not support the sweeping proposition the government asserts – that inadmissible aliens are necessarily beyond all substantive due process protections. *Mezei* was a procedural due process case considering the narrow question of whether someone the government had

identified as a security threat could be excluded without a hearing.[20]

Developments in this Court's due process jurisprudence since *Mezei* have eroded much of the rationale underlying *Mezei*. The dissent in *Mezei* sharply criticized arbitrary incarceration. 345 U.S. at 217-18 (Jackson, J., dissenting). *Mezei* was decided before the development of the due process "punishment doctrine" which forbids arbitrary incarceration. *Zadvydas*, 533 U.S. at 690; *Hendricks*, 521 U.S. at 356; *Foucha*, 504 U.S. at 80; *Salerno*, 481 U.S. at 755; *Jackson*, 406 U.S. at 738, and before the changes in due process jurisprudence established by *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The plenary power doctrine in the context of indefinite detention has been significantly curtailed since its zenith in *Mezei*. *Zadvydas*, 533 U.S. at 695. Just this term, this Court quoted from Justice Jackson's dissent in *Mezei* affirming the limits on the government's authority to detain even when national security is at stake:

> Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.

Rasul, 124 S. Ct. at 2692 (quoting *Mezei*, 345 U.S. at 218-19 (Jackson, J., dissenting)). *See also Kim*, 538 U.S. at 510 (recognizing limitations on indefinite detention of aliens). Thus, even when the government interests are highest, the Executive still does not enjoy unfettered discretion.

The Court has recognized the significant interest of aliens in a number of contexts. *See, e.g., Kwong Hai Chew*

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[20] In the end, after granting him an exclusion hearing, the government paroled Mr. Mezei anyway. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 984 n. 265 (1995).

v. Colding, 344 U.S. 590, 596 (1953) (recognizing liberty interest of lawful permanent resident alien); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Landon v. Plasencia*, 459 U.S. 21, 38 (1982) (noting lawful permanent resident aliens are entitled to advance notice of exclusion proceeding); *Plyler*, 457 U.S. at 210 (aliens are persons and therefore covered by Fifth and Fourteenth Amendments); *Zadvydas*, 533 U.S. at 721 (Kennedy, J. dissenting) ("both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious"). Most recently, the Court considered whether traditional notions of territory define the perimeters of habeas jurisdiction and concluded that the "reach of the writ depend[s] not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact. . . . " *Rasul*, 124 S. Ct. at 2697 (internal quotation marks omitted). To the extent that it relied on a territorial fiction, *Mezei* has been rejected or eroded to such an extent that the case is no longer relevant.

D. Indefinite Detention under Section 1231(a)(6) Also Raises Constitutional Doubt Based on the Absence of Procedural Due Process Protections.

Mr. Martinez asserted before the district court that his indefinite detention violated procedural as well as substantive due process rights. Because the case was resolved on purely statutory grounds in the lower courts, neither the procedural due process claims nor the facts personal to Mr. Martinez were fully developed. However, the constitutional shortcomings of the proceedings are readily apparent.

The detention statute, because it does not contemplate indefinite detention, makes no provisions for hearings, neutral fact-finders, or review. *Compare* 8 U.S.C. § 1226a (providing review procedures for indefinite detention of security risks) *with* 8 U.S.C. § 1231(a)(6). The only review for Mariel Cubans is regulatory and fails to provide detainees with minimal mechanisms to protect the integrity of the

process, such as impartial decision-makers, appropriate notice to detainees in advance of their interviews, disclosure of materials upon which the panel will rely, clear standards, creation of a record, and meaningful review. 8 C.F.R. § 212.12. *See Wolff v. McDonnell*, 418 U.S. 539, 557-58, 563-67 (1974) (setting out procedural due process minima); *Goldberg v. Kelly*, 397 U.S. 254, 264-71 (1970) (same); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 16 (1971). These minimal standards apply to persons with even less of a liberty interest than Mr. Martinez: they are serving criminal sentences imposed after receiving the full panoply of protections required in criminal cases. Especially given the significant risk of erroneous deprivation of liberty due to Cuban Review Panel decisions, the Cuban Review Plan regulations are constitutionally deficient.

The only factors that the government considers in making its discretionary release determinations are whether an alien poses a danger or flight risk. *See* 8 C.F.R. § 212.12(d)(2) and (3) (2004). In order to be meaningful, the decision to detain must consider both length of detention and foreseeability of removal. *Zadvydas*, 533 U.S. at 701 ("And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."). Because the Cuban Review Panel's review procedures do not require consideration of either of these factors, they offer no protection against the fundamental due process problem – indefinite, potentially life-long, incarceration of an alien whose removal cannot be effectuated.

Once a year, a Mariel detainee receives a file and/or personal interview, not before impartial reviewers, but before a panel composed of two or three people, all of whom are government employees charged with the detainee's detention and removal. 8 C.F.R. § 212.12(d)(1) (2004). Such "interrogation by one's captor . . . hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker." *Hamdi*, 124 S. Ct. at 2651. Because the interviews are not recorded and the detainee does not have access to either his immigration file or the material upon

which the decision is made, there is no record with which to address the partiality of the reviewer or to rebut the information upon which the detention decision is made. Without sufficient advance notice to prepare, the detainee has the burden of demonstrating all of the factors in § 212.12(d)(2), including proving that he or she is non-violent and will continue to be non-violent.

The Cuban Review Panel is not instructed to take into consideration crucial factors of a detainee's circumstances because they are not mentioned in the regulation. The Panel need not consider the length of the individual's detention, the probable length of future detention, or the access to (or lack of access to) rehabilitative programs. Nor do the regulations consider that prolonged detention in a medium security correctional institution or even a federal penitentiary at a remote location might have an adverse affect on the detainee's ability to maintain close family ties, to develop community support, and to obtain vocational training or remedial education – all explicit criteria for release. 8 C.F.R. § 212.12(d)(3).

Because there is no review of the Panel's decision, the detainee has no administrative recourse to challenge the Panel's decision.[21] The government's decision to detain an individual is based on the detaining officer's unguided judgment regarding the individual's file, or selected portions thereof, without considered input from the individual detainee. An adverse decision is based on the conclusion that the person has not met the (unspecified) burden of proving a lengthy list of factors, most of which involve inherently impossible predictions of future behavior. This does not comport with minimal due process.

[21] In 2000, the government repealed 8 C.F.R. § 212.13 which provided a single departmental review of the Panel's determination. 65 Fed. Reg. 80281, 80293 (Dec. 21, 2000). The agency explained that by December 21, 2000, the department had completed its review of the detention of all Mariel Cubans denied parole and that, therefore, the provisions for review were no longer necessary. *Id.* The government has made no review provisions for Mariel Cubans, such as Mr. Martinez, whose parole was subsequently revoked.

Before *Zadvydas*, the Third Circuit found that the government violated the detainee's due process rights by denying parole based solely on the detainee's criminal history:

> [T]he petitioner in this case was repeatedly denied parole by INS officials based on no more than a reading of his file that listed years-old convictions for firearm, attempted robbery, and bail jumping offenses. No inquiry was made to ascertain, for example, whether the bail jumping offense was the result of a lack of notice, misunderstanding, or an affirmative effort to avoid apprehension. The INS made no effort to determine if such conduct was presently likely to be repeated or whether it could be discouraged by requiring appropriate surety. Through at least four denials of parole, the INS continued to cite to the petitioner's now nearly ten-year old convictions as justification to confine him.

Ngo v. INS, 192 F.3d 390, 398 (3rd Cir. 1999); *accord Phan v. Reno*, 56 F. Supp. 2d 1149, 1157-58 (W.D. Wash. 1999) (finding procedural due process violation in the context of pre-*Zadvydas* indefinite detention of deportable aliens).

Finally, the regulations place the burden of proof on the detainee, when the interest in release from indefinite detention, if not requiring proof beyond a reasonable doubt, at least dictates that the burden rest on the government. *See Sandstrom v. Montana*, 442 U.S. 510, 514-27 (1979) (jury instruction unconstitutionally shifted burden of proof of element of offense from state to defendant); *Addington v. Texas*, 441 U.S. 418, 427 (1979) ("[T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."); *In re Winship*, 397 U.S. 358 (1970) (the burden is always upon the prosecution to establish every element of crime charged by proof beyond a reasonable doubt). *See Zadvydas*, 533 U.S. at 702 (requiring detainee to prove that there is absolutely no prospect of removal in order to

secure release "demands more than our reading of the statute can bear"). These procedures are facially inadequate to protect a detainee's procedural due process rights.

CONCLUSION

For the foregoing reasons, the grant of relief by the District Court and the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

A. NEIL CLARK, FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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A. NEIL CLARK, FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

SERGIO SUAREZ MARTINEZ

REPLY BRIEF FOR THE PETITIONERS

Respondent's and his amici's arguments fail because they would effectively interpose a six-month expiration date on the Political Branches' exercise of their historic and vital power to exclude aliens, and because they take no account of the proven reality that release under supervisory conditions has not worked for respondent and the other aliens whose cases are pending before this Court (see U.S. Br. 10-11 n.6). The very essence of exclusion is the capacity to keep an alien physically out of and separated from the American community. Here, the Political Branches have made the quintessentially political decision that a recidivist criminal alien dispatched to American shores by a hostile foreign government cannot safely or appropriately be released into the country. When, as here, that hostile government refuses to repatriate its citizen, the *only* mechanism for the Political Branches to enforce their sovereign prerogative of exclusion and to counter foreign manipulation and the threat to domestic safety is to detain the alien. There is no other way.

A. *Mezei*, Not *Zadvydas*, Informs The Proper Resolution Of This Case

Respondent first argues (Br. 19-23) that *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), forecloses the detention beyond six months of aliens stopped at the border, and that principles of *stare decisis* compel adherence to controlling precedent. Respondent is half right. This Court has directly addressed the government's power to continue to exclude—to detain—an alien who was stopped at the border and who

cannot be repatriated. That controlling precedent, however, is not *Zadvydas*, which expressly and repeatedly distinguished the question presented here. See 533 U.S. at 682, 693-696. It is *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Here, as in *Mezei*, "[t]he issue is whether the Attorney General's [now, Secretary's] continued exclusion" of an alien who could not be repatriated "amount[ed] to an unlawful detention, so that courts may admit him temporarily to the United States on bond until arrangements are made for his departure abroad." 345 U.S. at 207. This Court held that the government's "continued exclusion" (*id.* at 207, 215)—indefinite detention—of Mezei did not "deprive[] him of any statutory or constitutional right" (*id.* at 215), given the government's historically comprehensive power over excluded aliens (*id.* at 212). The Court did so, moreover, on the basis of statutory text that lacked any explicit authorization for indefinite detention (see *id.* at 210 n.7; cf. *Zadvydas*, 533 U.S. at 697), and notwithstanding Mezei's physical presence within the United States (345 U.S. at 215), or his 25-year stay in the United States (*id.* at 208).

Respondent attempts to distinguish *Mezei* on five grounds, none of which succeeds. First, respondent argues (Br. 40) that *Mezei* involved only the power of "exclusion without hearing in certain *security cases*." But the language respondent quotes from *Mezei* is the Court's description of its earlier holding in *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953), a case that, the Court explained in the very next sentence, "drastically differs" from Mezei's, because Kwong Hai Chew was a resident alien. *Mezei*, 345 U.S. at 214. Beyond that, while the Court referred to the fact that Mezei was denied entry as a security threat to explain why Congress might have chosen to exclude him, *id.* at 208, the Court's categorical holding concerning the broad power of the government over aliens "on the threshold of initial entry," *id.* at 212, relied entirely on extant precedent governing the Political Branches' comprehensive control over excluded aliens. Those cases made clear that "[Mezei's] right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate." *Id.* at 216.

Second, respondent insists (Br. 40) that *Mezei* implicated the Executive Branch's unique authority during "*periods of international tension and strife*." That is not a difference. See *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (plurality opinion of O'Connor, J.). The ongoing war in Iraq, military operations in Afghanistan, and vigorous efforts to protect the Nation against further terrorist assaults only underscore the importance of preserving the Political Branches' control over the borders and their capacity to prevent the insinuation of dangerous aliens into American society. And, of course, the hostility of the Castro regime toward the United States, which has resulted in the periodic instigation of migration crises (including the one that brought respondent to our shores), continues unabated.

In any event, every and "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952)). As this Court has recognized, the judiciary is "ill equipped" to attempt, on a case-by-case basis, "to determine the[] authenticity and utterly unable to assess the[] adequacy" of those foreign policy objectives or the Political Branches' implementation of them. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

Third, respondent argues (Br. 41) that Mezei sought actual admission into the United States, not release under supervisory conditions. That is wrong. See *Mezei*, 345 U.S. at 207 ("The issue is whether * * * courts may admit him

temporarily to the United States on bond until arrangements are made for his departure abroad."); see *id.* at 209 (issue is whether "respondent's 'confinement' [is] no longer justifiable as a means of removal elsewhere").

Fourth, respondent contends (Br. 42) that *Mezei* involved "an arriving rather than a departing alien," and thus addressed the government's effort to "prevent entry" as opposed to the "procedures necessary to remove a person already in the United States." That too is wrong. The defining dilemma of both respondent's case and Mezei's is that they can neither come nor go. Both Mezei and respondent were denied entry upon arrival; both were physically within United States territory, rather than left sitting at the border; both were subjected to administrative proceedings that resulted in final orders denying admission and ordering their departure; for both, "all attempts to effect respondent's *departure* have failed," 345 U.S. at 208 (emphasis added); and for both, the issue for the Court is the lawfulness of "continued exclusion"—detention—until "*departure* abroad" can be achieved (*id.* at 207) (emphasis added).[1]

Fifth, respondent insists (Br. 42) that a judicial order releasing him into the United States would not "implicate the Political Branches' plenary powers over expulsion or exclusion." This Court certainly thought otherwise in *Zadvydas*, when it explained that Zadvydas' previous admission to the United States for permanent residence made it unnecessary "to consider the political branches' authority to control entry into the United States" in the first instance. 533 U.S. at 695.

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[1] Respondent (Br. 42) and his amici (Nat'l Refugee Orgs. Br. 5, 7) decry "hyper-technical reliance" on the "entry-fiction"—the notion that an alien's parole and physical presence have no effect on his status as an applicant for admission. But that treatment is a statutory command. See 8 U.S.C. 1182(d)(5)(A) (upon termination of parole, an alien's "case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States").

By contrast, a decision by the Court compelling respondent's release into American society would entail a direct judicial confrontation with and erosion of the Political Branches' joint control of the borders and management of a foreign policy crisis. That is because (i) respondent was apprehended at the border (ii) through the concerted application of law enforcement resources by the Executive Branch, (iii) in response to a migration crisis and a "state of emergency in south Florida" (Nat'l Refugee Orgs. Br. 11), (iv) that was deliberately instigated by a hostile foreign government, (v) as a foreign policy ploy, (vi) to wring foreign policy concessions from the United States, (vii) in part, by sending violent criminals onto American shores. See U.S. Br. 39-40. Congress and the Executive Branch responded to that foreign policy crisis through use of the Attorney General's parole authority, 8 U.S.C. 1182(d)(5)(A) (Supp. IV 1980), and through the passage of legislation offering the Mariel Cubans a special opportunity to become lawful permanent residents and ultimately citizens. To ensure that Castro's foreign policy machinations did not endanger the safety of the American public, Congress and the Executive Branch conditioned parole and adjustment of status on the aliens' willingness to lead law-abiding lives. See U.S. Br. 7-8.

Respondent thus seeks a judicial command to release onto American streets those individuals whom the Political Branches intercepted at the border during a migration crisis, who have spurned the United States' offers of parole and adjustment, and who have endangered the lives, health, and property of Americans by engaging in repeated felonies. Such an order would countermand the Political Branches' handling of an international crisis, would preclude the government from speaking with one voice in its response to the Cuban Government, and would put Americans at a heightened risk of repeated criminal victimization by Cuba's own nationals—the very ones Castro has refused to take back. Importantly, respondent does not deny that he and the other

aliens pose a very real risk to public safety. He simply contends (Br. 43) that the risk must be tolerated because the government can incarcerate excluded aliens for their crimes *after* they are committed. That argument misses the point. The successful management of foreign relations and national security seeks to prevent the harms that foreign powers or foreign persons would inflict on Americans *before* they are fully realized.

Calling it "release on supervision" rather than "re-parole" (Resp. Br. 43 n.19) does not change anything. Respondent is simply engaging in word games. See *Black's Law Dictionary* 1006 (5th ed. 1979) (defining "parole" as a "conditional release * * * generally under supervision"). The end result —release onto American streets—is the same. The only difference is that parole is ordered by the Executive Branch, which Congress has charged with such release decisions, 8 U.S.C. 1182(d)(5)(A), only when the Executive concludes that release will not endanger the public's safety or foreign relations. The release that respondent seeks, by contrast, would be compelled by the Judicial Branch over the public safety and foreign policy objections of the Political Branches. Therein lies the affront to the separation of powers.

Unable to distinguish *Mezei*, respondent ultimately argues (Br. 44-46) that it is no longer good law. But respondent does not cite a single decision of this Court in the half-century since *Mezei* was decided that calls into question the fundamental distinction in immigration law and in the Constitution between aliens stopped at the border and those who have entered. *Zadvydas* reaffirmed it. 533 U.S. at 693. Indeed, for "constitutional purposes," those legal distinctions "made all the difference" in *Zadvydas*. *Ibid.* Even Justices Jackson and Frankfurter, dissenting in *Mezei*, agreed that Mezei had no substantive due process right not to be subject to indefinite detention. 345 U.S. at 224. The cases that respondent cites (Br. 44-46) confirm the continuing vitality of

the distinction between aliens stopped at the border and those who have entered, because they involve the due process rights of United States citizens (see *Hamdi*, *supra*), lawful permanent residents (*e.g.*, *Kim*, *supra*; *Kwong Hai Chew*, *supra*; *Landon* v. *Plasencia*, 459 U.S. 21 (1982)), or the children of aliens who entered the United States illegally (see *Plyler* v. *Doe*, 457 U.S. 202 (1982)).[2]

B. The Statutory Text And Structure Confirm The Secretary's Power To Detain Excluded Criminal Aliens

1. Although respondent argues (Br. 17-23) that the "plain" text of 8 U.S.C. 1231(a)(6) subjects the detention of excluded aliens to a presumptive six-month time cap, one scours the statute in vain for any such words of limitation. The text of Section 1231(a)(6) provides in unqualified terms that excluded aliens "may be detained beyond the removal period." 8 U.S.C. 1231(a)(6). That language "suggests discretion" and "literally" sets no time limit on the detention of excluded aliens who cannot be removed. *Zadvydas*, 533 U.S. at 689, 697. Indeed, the Court in *Zadvydas* acknowl-

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[2] Respondent's assertion (Br. 35) that *Plyler* addressed the constitutional rights of excluded aliens paroled into the United States is wrong. See 457 U.S. at 213 n.12 ("[T]he undocumented children who are appellees here * * * could apparently be removed from the country only pursuant to deportation proceedings."). Respondent's reliance (Br. 44) on a case that preceded *Mezei* by nearly 50 years—*Chin Yow* v. *United States*, 208 U.S. 8 (1908)—is equally unavailing, because the narrow question presented in that case "was whether the petitioner was a citizen of the United States before he sought admission." *Tod* v. *Waldman*, 266 U.S. 113, 119 (1924), as modified, 266 U.S. 547 (1925). *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), is even further afield, because that case decided only the statutory question of whether persons forcibly brought by the United States to territory within its plenary and exclusive jurisidction could bring a habeas corpus action to challenge their detention. *Id.* at 2693, 2699. The Court did not decide that alien combatants have any cognizable statutory or constitutional rights, much less a right to be released into the United States. The United States does not dispute that respondent could bring a habeas corpus action to review his detention. See *Mezei*, 345 U.S. at 213.

edged that its presumptive cap on the detention of former lawful permanent residents was the product of judicial inference, undertaken in the absence of "clearer terms" authorizing the long-term detention of a class of aliens who have long enjoyed significant due process protections. *Id.* at 697.

Those "clearer terms" are present, and the countervailing constitutional concerns are absent, for aliens stopped at the border. Section 1182(d)(5)(A) of Title 8 expressly empowers the Secretary, "in his discretion," to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." That Section further provides that, "when the purposes of such parole shall, in the opinion of the [Secretary], have been served the alien shall forthwith return or be returned to the custody from which he was paroled." The clear import of those provisions is that, for aliens stopped at the border, detention is the starting premise and the background norm, and release on parole is a discretionary "act of extraordinary sovereign generosity." *Jean* v. *Nelson*, 727 F.2d 957, 964 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). Congress specifically preserved that broad discretion in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, when it carried the parole authority forward without modification, even though Congress was aware of the long-term detention of the Mariel Cubans. See U.S. Br. 31-32.

Respondent insists (Br. 27-28) that the parole provision is irrelevant because Section 1231(a)(6) governs post-removal-order detention. But respondent's detention, unlike the former lawful permanent residents' in *Zadvydas*, is not merely auxiliary to or in aid of removal. It is the act of exclusion itself. For aliens like respondent, who cannot be safely released on parole, detention is the only means by which the United States can exercise its inherent and uncontested

power to keep them out and to protect American society from them. The removal order enforces that exclusion decision. It does not supplant it. Respondent's detention is thus as much a product of his parole revocation as it is of the entry of a removal order.

In any event, this Court "construe[s] statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). The authorization to detain excluded aliens pending their removal in Section 1231(a)(6) thus must be read *in pari materia* with Section 1182's background presumption and authorization of detention for excluded aliens. Construing Section 1231(a)(6) to afford aliens who have been denied any relief from exclusion and ordered removed based on crimes committed within the United States a greater right to release than arriving aliens who pose no discernible risk to public safety would be absurd, especially since Section 1231(a)(6) was added by IIRIRA, a statute designed to enhance the Executive Branch's capacity to remove criminal aliens from the United States (see U.S. Br. 30-31).

2. Respondent further contends (Br. 18-19) that Congress "unequivocally answered the question" whether excluded aliens should be subjected to the presumptive time limit this Court adopted in *Zadvydas* because Congress collocated both aliens stopped at the border and those who have entered as the "grammatical subject" of Section 1231(a)(6), and subjected both groups "to the same predicate—the detention provision this Court construed in *Zadvydas*." But that common predicate is "may be detained." 8 U.S.C. 1231(a)(6). The word "may" is an authorization of executive action and an express grant of power that connotes discretion and flexibility based on context. Whatever implicit restrictions on that grant of authority may exist in the context of aliens who enjoy constitutional protections, they

should not be extended to what the Court itself has recognized is a wholly different class of aliens.[3]

Respondent's argument suffers from an even more fundamental flaw, because it would require the Court to conclude two things, neither of which is plausible. First, respondent's argument assumes that, through the mere act of listing different classes of aliens seriatim at the beginning of Section 1231(a)(6)'s grant of authority, Congress surrendered the Political Branches' historic and comprehensive power over aliens stopped at the border.[4] Second, respondent's argument assumes that Congress intended to enhance significantly the rights and protections afforded those excluded aliens who have proven themselves least deserving of this country's hospitality—those whose crimes against Americans have rendered them ineligible for any relief from exclusion and have given rise to a final order of removal. But "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). "Especially is this so where the construction contended for purports to raise a serious constitutional question as to the role of the judiciary under the doctrine of separation of powers," *Ullman* v. *United* States, 350 U.S. 422, 433 (1956), by weakening the Political Branches' control over the Nation's borders, foreign policy, and national security.

3. Respondent next insists (Br. 21-22) that, statutory text and purpose aside, once the operation of statutory language in one context necessitates application of the constitutional avoidance canon, that construction must forthwith govern all applications of the statute. Respondent cites no authority from this Court for that proposition. In fact, variation in the operation of statutory terms in immigration law, based on the characteristics and status of aliens, is commonplace. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292 (1993) (the same words in a single statutory provision providing that the Attorney General "may" detain an alien, see 8 U.S.C. 1252(a)(1) (1982), supported different release rules for juvenile aliens and adults). That same result occurs when constitutional considerations compel a narrow construction of a statutory term only in specialized contexts. See U.S. Br. 29 & n.14 (discussing *Crowell* v. *Benson*, 285 U.S. 22 (1932), and *Lane* v. *Pena*, 518 U.S. 187 (1996)). Respondent wants more examples (Br. 21 & n.8): *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533 (2002), is another. There, the Court applied the rule of constitutional doubt to conclude that the tolling provision in 28 U.S.C. 1367(d) operates differently for States than for other defendants, even though the statutory language facially embraces all such claims on equal terms. 534 U.S. at 542-546. The very next year, the Court refused to extend that same reading of statutory language to a suit against a political subdivision, because "no such constitutional doubt arises" in that context. *Jinks* v. *Richland County*, 538 U.S. 456, 466 (2003). In addition, the Court routinely interprets the term "person" to exclude States but to include municipalities, because the former implicate constitutional concerns that the latter do not. Compare, *e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), with *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119 (2003).

At a more basic level, respondent's argument overlooks that the foundational purpose of the doctrine of constitutional avoidance is to respect congressional judgments and to give the fullest possible effect to the laws Congress enacts.

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[3] See *Kentucky Dep't of Corrs.* v. *Thompson*, 490 U.S. 454, 464 (1989) (use of "may" following a list of "substantive predicates" "stop[s] short of requiring that a particular result is to be reached upon a finding that the substantive predicates are met"; persons within the listed groups may be treated similarly, "but they need not be").

[4] Other parts of IIRIRA evidence that Congress, in fact, carried forward the legal distinction between aliens stopped at the border and those who have entered the United States. See 8 U.S.C. 1182(d)(5), 1229c(a)(4); 8 U.S.C. 1182(a), 1227(a) (2000 & Supp. I 2001).

Reflexively extending a specialized construction of statutory language adopted in a constitutionally sensitive context to a historically, structurally, and politically distinct context, would transform the rule of constitutional avoidance from "a valuable servant, [into] a dangerous master to follow in the construction of statutes." *Ford* v. *United States*, 273 U.S. 593, 612 (1927). That is particularly true when the initial construction that avoids constitutional concerns takes the form of a judicially implied contraction of an express congressional grant of authority. Transplanting that implied restriction to a context that does not implicate the same constitutional concerns would reflect unjustified judicial lawmaking, not adherence to the constitutional avoidance doctrine.

4. Respondent (Br. 24-27) relies heavily on 8 U.S.C. 1226a(a)(6) (Supp. I 2001), which authorizes the indefinite detention of terrorist aliens whose removal is not foreseeable "for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." That statute is of no help to respondent. First, Section 1226a was enacted five years after Section 1231(a)(6), and thus is "beside the point," because later-enacted laws "do not declare the meaning of earlier law." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998).

Second, Section 1226a was enacted in the wake of both the *Zadvydas* decision and the September 11th terrorist attacks, which were committed by aliens who had entered the United States and thus whose detention pending removal might have been covered by *Zadvydas*. Section 1226a cabins *Zadvydas*'s scope to ensure that the Court's presumptive six-month cap on detention does not impinge on national security or "the safety of the community," 8 U.S.C. 1226a(a)(6) (Supp. I 2001). Therefore, respondent's argument that Section 1226a somehow evidences Congress's intent to expand *Zadvydas* gets it exactly backwards.

Finally, Congress's enactment of legislation that addresses security risks posed by particular individuals to the United States does nothing to address security risks that are created by the policies of foreign governments, rather than the character of individual aliens. Among those countries that have proven most reluctant to repatriate their nationals are Iran, Ethiopia, Somalia, Cuba, Vietnam, and, formerly, Iraq. Any construction of Section 1231(a)(6) that would curtail the Political Branches' ability to stop the infiltration of dangerous individuals from those countries and to prevent them from being released into American communities necessarily would affect the balance of power between the United States and those countries and would erode the Nation's ability to speak forcefully, with one voice, in such sensitive and complex foreign relations. Furthermore, even if not denominated terrorists under Section 1226a, recidivist criminals' serial acts of murder, rape, assault, and pedophilia can substantially erode community safety and stability. Foreign governments should not be able to count on the Judicial Branch releasing such criminal elements into American society after the Political Branches have intercepted them, denied them admission, determined that they are a threat to public safety, and initiated diplomatic processes to effect their return.[5]

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[5] The rule of lenity (Resp. Br. 31-32) is a tool for construing ambiguous statutory terms in statutes that create or impose punitive sanctions. The exclusion and attendant detention of aliens stopped at the border is not punishment. Even if it were, respondent had ample notice that the government could take measures, including detention, to bar his entry into the United States. Moreover, the mere existence of "grammatical possibility" does not license courts to craft extra-textual time limits on the constitutionally based power of the Political Branches to exclude aliens whose presence in the United States would threaten public safety. *Caron* v. *United States*, 524 U.S. 308, 316 (1998). Finally, the rule of lenity does not apply when, as here, "the ambiguous reading relied on is an implausible reading of the congressional purpose." *Ibid.*

C. Preserving The Executive Branch's Detention Authority Serves Vital Purposes

Respondent largely ignores the critical interests served by preserving the Secretary's authority to detain aliens who were stopped at the border and subsequently ordered removed (*i.e.*, formally excluded) based on their criminal activities in the United States while released on discretionary parole. The basic purpose of detention for aliens stopped at the border and ordered removed is exclusion itself. The very essence of exclusion is physically stopping and preventing an individual from entering American society. When there is no avenue for sending the alien back and when his release on parole poses a threat to public safety, the only practicable means of exclusion is detention. This Court recognized as much in *Mezei* when it thrice referred to the alien's potentially indefinite detention as "continued exclusion." 345 U.S. at 207, 215.

The Secretary's grant of parole in cases in which he determines that public safety, foreign relations, and the national interest will not be compromised, conditioned on terms established and enforced by the Secretary, is consistent with exclusion because the Political Branches retain complete control over the foreign national's ability and opportunity to move within American society. But a judicially mandated release, over the express determination of the Secretary that release is contrary to the interests of the United States, bears no resemblance to the historic power of exclusion. It would take control of the excluded alien out of the hands of the Political Branches; it would deny the government the ability to prevent and preempt harms to the United States and its citizens before they happen; and it would arm hostile foreign powers with a new means of harming or threatening the interests of the United States—one that the Political Branches could not stop.

Preserving the Secretary's detention authority also ensures that the parole under 8 U.S.C. 1182(d)(5)(A) of aliens stopped at the border remains a matter of grace after they have been formally barred from the country under a final order of removal, just as it was before entry of that order. Parole should remain a benefit limited to cases where the Secretary affirmatively determines that the "public benefit" would be served, rather than undercut, by release. To read Section 1231(a)(6) as bestowing on individuals the very right to release that the Secretary withdrew based on their criminal activity—and to do so *because* the United States has arrived at a formal and definitive determination in a final order of removal that the aliens should be barred from the country—would be perverse and would frustrate the operation of the parole system. *Zadvydas* itself recognized that potential problem and provided that "the alien no doubt may be returned to custody upon a violation of those [release] conditions." 533 U.S. at 700. But, because every single Mariel Cuban currently in detention pending their removal has had his parole revoked at least once for criminal conduct, respondent can prevail only if the Court expands *Zadvydas* to cap the length of time that individuals may be *re-detained* after they have already proven themselves unwilling to adhere to reasonable release conditions.

In addition, respondent and his amici go to great lengths to paint the United States' detention—continued exclusion—of respondent as inhumane and "offend[ing] the[ir] moral values" (Religious Orgs. Br. 2). Long-term detention, however, is not something that the United States relishes. Quite the opposite, the government gave respondent and the other Mariel Cubans being detained numerous opportunities to avoid detention and to live within the United States, through parole and re-parole, the opportunity to adjust their status, and the provision of benefits under the numerous special programs chronicled by respondent's amici. See Nat'l Refugee Orgs. Br. 15-20. Respondent and the other detained

aliens chose instead to commit crimes within the country that had taken them in with "an open heart and open arms" (Resp. Br. 8). Indeed, while respondent (Br. 16, 36-37, 43) makes much of the two decades he has spent in the United States, most of that time has been spent in the American criminal justice system. In the 20 years he spent on immigration parole, respondent managed to accumulate and serve 16 1/2 years' worth of criminal sentences. U.S. Br. 9-10.

Furthermore, while respondent and his amici express great solicitude for the interests of selected detainees (Resp. Br. 10-11; Cuban Bar Br. 16-29), those are not the only interests at stake here. A genuinely humanitarian response to the dilemma of recidivist criminal aliens who cannot be readily removed must balance all the affected interests, including (i) the interests of past and prospective victims of the aliens' crimes; (ii) the lives and safety of prospective immigrants who will have a greater incentive to undertake risky migrations to the United States due to the increased prospects of release into the country if they arrive at our shores; (iii) the lives and safety of persons who might be encouraged or compelled (as Castro did in 1980) to undertake such hazardous departures as a newly revitalized tool of foreign policy; (iv) the interests of all arriving aliens, whose opportunities for parole and a humanitarian response to migration crises might have to be curtailed; and (v) the acute interest of all Americans in current times in the vigorous protection of the borders and national security against the insinuation of dangerous individuals into the United States. When *all* the relevant interests are put on the table, the "right" humanitarian response to, for example, Angel Casares' murder/manslaughter conviction and his continued physical altercations in detention (see Cuban Bar Br. 27-28) is not the one amici posit. While amici might not hesitate to put such a violent person back on the streets, nothing in the Constitution, Section 1231(a)(6), or "community and religious values" (Religious Orgs. Br. 12), requires the government to

share their optimism and to visit the substantial risk of an erroneous decision on the innocent public, rather than on the unadmitted alien who has demonstrated a persistent disregard for law and basic human decency.[6]

Finally, respondent's (Br. 32-33) and his amici's (Cuban Bar Br. 14) accusations concerning the violation of international law are more appropriately leveled at the Cuban government, which is violating international law by refusing

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[6] See *Kim*, 538 U.S. at 518-519 (noting high recidivism rates of removable criminal aliens); U.S. Br. 30-31 & n.16. It is doubtful that the communities whose residents have already been assaulted, raped, and molested by the other aliens identified in respondent's and the amici's brief or the communities into which those dangerous individuals would be released share amici's "community values" or moral imperative for release. Federal detention, immigration, and court records (copies of which will be lodged with the Clerk of the Court at the Court's request) reveal, for example, that Hector Penalver (Resp. Br. 10) had his parole revoked after committing numerous crimes of violence, including hitting a man in the head with a pipe, leaving the victim permanently disabled. While in detention, he was convicted of repeatedly stabbing another inmate with a homemade knife. Manuel Cespedes-Leon (*id.* at 11) was convicted of first-degree sodomy on an 11-year old child. Armando Areno-Aleman (*ibid.*) was convicted of three counts of raping a child under the age of 12 and four counts of sexually abusing minors. Arturo Vigil-Hernandez (*ibid.*) had his parole revoked after a conviction for lewd contact with a child under 16 (putting his penis in the mouth of a 4-year-old boy). After Jose Zayas's (*ibid.*) first parole was revoked for criminal activity, he was re-paroled and then committed attempted rape in the first degree while armed with a deadly weapon. While in detention, he has received approximately 26 citations for fighting, assault, destruction of property, and refusing to obey orders. Enrique Acosta Delgado (Cuban Bar Br. 19) was convicted of a violent assault with a handgun and trafficking more than 10,000 pounds of marijuana. When the government offered him a second chance, he ran away from the halfway house and later was convicted of possession with intent to sell cocaine base. Manuel Navarro's (*id.* at 20) record of violence includes two counts of assault with a deadly weapon (an ax). When the government offered him a second chance at parole, he committed rape. Mario Moreno-Pena's (*id.* at 28) difficulty in obtaining release was no doubt attributable both to his multiple convictions for a broad array of drug offenses and robbery, including a 128-month sentence for cocaine trafficking, and his violation of parole and re-parole conditions (including engaging in assaultive behavior).

to repatriate its own nationals. In any event, respondent and his amici have not demonstrated that any established norm of international law either precludes the continued exclusion of criminal aliens from a country or compels the re-release of excluded recidivist criminals who have proven themselves unwilling to adhere to reasonable release conditions. See *Al-Kateb* v. *Godwin*, No. A253/2003, 2004 WL 1747386 (Australia Aug. 6, 2004) (rejecting challenge to statute under which administrative detention of unlawful aliens is mandatory until they are granted a visa or removed, even if their removal is not foreseeable).[7]

D. The Existing Parole Regulations Adequately Protect The Aliens' Interests

Respondent argues (Br. 46-50) that the existing parole system fails to protect adequately his constitutionally protected liberty interest in being released from detention into the United States. But respondent has no such liberty interest. Aliens stopped at the border and ordered removed have no due process right not to be subject to continued exclusion and the detention necessary to effect that exclusion. They have no due process right to release into the United States at all. The ability of the national government to determine that an alien stopped at the border has no right to enter and no right to be physically present within the United States in any form is both "inherent in sovereignty" and "essential to self-preservation." *Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). The alien ordered excluded has no right to due process in that exclusion determination, no matter how long the

[7] See also *Jean*, 727 F.2d at 964 ("For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty."). Amici's reliance (Cuban Bar Br. 14) on the decision of the Inter-American Commission on Human Rights is misplaced. The United States is not a party to the Inter-American Convention on Human Rights and has rejected the Commission's non-binding decision. See http://www.iachr.org/Respuestas/USA.9903.htm.

order of exclusion remains in effect. This Court has recognized that fundamental rule of law for more than a century. See U.S. Br. 16-20 (citing cases). The recalcitrance of foreign governments cannot change that.[8]

Accordingly, the constitutional starting point for aliens, like respondent, who were stopped at the border, paroled, had their parole revoked, and were subjected to a final order of removal, is custody, not liberty. Respondent has never been and claims no right to be free of federal custody. Indeed, aliens stopped at the border "are always in some form of custody." *Flores*, 507 U.S. at 302 (quoting *Schall* v. *Martin*, 467 U.S. 253, 265 (1984)). The due process interest asserted here thus is not against the deprivation of pre-existing liberty; it is in "being denied a conditional liberty" —a particular form of custody—"that one desires." *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 9 (1979). Even for persons lawfully present in the United States, the Due Process Clause affords minimal protection to the "natural desire" of those lawfully detained to be released on parole. *Id.* at 7. As long as the government provides an opportunity to be heard and an explanation of the grounds for denial, which the government's parole regulations do, U.S. Br. 45, that is all "the process that is due" to *citizens* under the Constitution, *id.* at 16, and thus perforce is sufficient to satisfy the due process right that respondent mistakenly claims.

Respondent insists (Br. 49) that the government should bear the burden of proving that detention—continued exclusion—is warranted. But, at the border, the burden is on the alien to demonstrate "clearly and beyond doubt" a right to admission, 8 U.S.C. 1229a(c)(2), 1361, or to obtain a discre-

[8] Repatriation efforts with Cuba are ongoing. A total of 1688 aliens have been returned. We have been informed by the Department of Homeland Security that ten have been returned since the government filed its opening brief in this case.

tionary exercise of the parole authority. When respondent's criminal activity resulted in his parole revocation, he was, by force of law, placed in the same legal position as when he first arrived at the border. 8 U.S.C. 1182(d)(5)(A). Respondent makes no effort to explain why his personal choice to use the discretionary gift of parole to commit multiple crimes in the United States should enhance his due process rights.[9]

Respondent argues (Br. 47-48) that the foreseeability of removal and the length of detention must weigh in favor of parole. In the immigration context, however, the prospect of removal and the length of detention are functions of two things: the lack of cooperation by foreign governments and the criminal misbehavior of the alien when detained and when previously paroled. It would be perverse for either the foreign governments' resistance or the alien's misconduct to enhance an alien's rights under the Constitution after he has been ordered excluded by the Political Branches.

* * * * *

For the foregoing reasons, and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

SEPTEMBER 2004

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[9] Importantly, respondent does not challenge the process he received when his order of removal was entered. And the criminal convictions that underlie his parole revocation and continued detention were obtained in criminal trials pursuant to the most vigorous due process protections. Amici Nat'l Refugee Orgs. is wrong to suggest that the Mariel Cubans were admitted, de facto or de jure, as refugees. *Garcia-Mir* v. *Meese*, 788 F.2d 1446, 1452 (11th Cir.), cert. denied, 479 U.S. 889 (1986); *In re M/V Solemn Judge*, 18 I. & N. Dec. 186, 191 (BIA 1982). If any of the aliens before this Court wished to challenge their legal status under the immigration law, the appropriate forum in which to do so was their removal proceedings.

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IN THE
Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE CUBAN AMERICAN BAR ASSOCIATION, CUBAN AMERICAN NATIONAL FOUNDATION, HISPANIC NATIONAL BAR ASSOCIATION, AMERICAN IMMIGRATION LAW FOUNDATION, AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amicus curiae the Cuban American Bar Association (CABA) was established in Miami in 1974 by a group of approximately 20 Cuban attorneys adapting to a different culture. CABA now has nearly 2000 members, representing all segments of the Cuban American legal community. CABA is actively involved in protecting the human rights and legal interests of Cubans and Cuban Americans.[1]

The Cuban American National Foundation (CANF) is a non-profit organization dedicated to advancing freedom and democracy in Cuba. Established in Florida in 1981, CANF is the largest Cuban organization in exile, with thousands of members across the United States and other countries, representing a cross section of the Cuban exile community as well as friends of Cuban freedom from around the world.

The Hispanic National Bar Association (HNBA) is a national non-profit association representing the interests of Hispanic American members of the legal community in the United States and Puerto Rico. Founded in 1972, HNBA now represents thousands of Hispanic Americans in the legal profession. Its primary objectives are to increase professional opportunities for Hispanics in the legal profession and to address issues of concern to the national Hispanic community. HNBA is a member of the National Hispanic Leadership Agenda and also holds a seat in the American Bar Association House of Delegates.

The American Immigration Law Foundation is a non-profit organization founded in 1987 to increase public understand-

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

ing of immigration law and policy, to promote public service and professional excellence in the immigration law field, and to advance fundamental fairness, due process, and basic constitutional and human rights in immigration law.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association. Founded in 1946, AILA now has more than 8,500 members organized in 35 chapters across the United States and in Canada. AILA's members' clients may be directly affected by the decision in this case.

Amici submit this brief to explain the wholesale inadequacy of the administrative procedures under which Mariel Cubans who have served their criminal sentences may be detained indefinitely—and possibly forever. Even if the Court were to determine that Mariel Cubans are entitled to some lesser degree of due process protection than the former lawful permanent residents in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001)—a position which *amici* reject—the inadequacies of the Mariel Cuban release procedures raise serious questions about whether indefinite detention under such a scheme is constitutionally permissible.

Amici do not address the threshold due process questions here as those issues are thoroughly addressed in other briefs. *See, e.g.*, Brief of the American Bar Association *Amicus Curiae* in Support of Petitioner, *Benitez* v. *Mata*, No. 03-7434. Rather, this brief assumes that Mariel Cubans like the respondent are entitled to some degree of due process with respect to their detention, and addresses the government's alternative argument that even if that were the case, existing procedures would satisfy due process. *See* Pet. Br. at 43-49.

As set forth in greater detail below, the "Cuban Review Plan," while perhaps creating the illusion of a meaningful process, falls far short of what the Due Process Clause even minimally requires. These deficiencies have real consequences for the hundreds of Mariel Cubans who languish in immigration imprisonment awaiting a removal that is unlikely ever to be effectuated. Respondent Sergio Suarez Martinez was twice denied release pursuant to the Cuban Review Plan based on criminal convictions for which he had already served his sentence. The experiences of the Mariel Cubans discussed in this brief provide further examples of the unjustified consequences of a process that denies detainees many of the most basic procedural safeguards. Thus, even if this Court's decision in *Zadvydas* did not resolve the statutory question presented here, principles of constitutional avoidance would independently compel this Court to adopt the same construction of the statute that it did in that case.

BACKGROUND

1. Indefinite Detention and *Zadvydas*. In *Zadvydas*, this Court recognized that a "serious constitutional problem" would result from an interpretation of the post-removal-period detention statute that permitted the government to detain former lawful permanent residents indefinitely when their removal was unlikely to be effectuated in the reasonably foreseeable future. 533 U.S. at 690. In reaching this conclusion, the Court stated that the aliens, although subject to removal, retained a significant liberty interest in freedom from imprisonment. *Id.* The Court then noted the "obvious" constitutional problem with construing the statute to authorize indefinite detention given that "the sole procedural protections available to the alien" were administrative review proceedings that would not be adequate "even for property," much less to permit the "indefinite, perhaps permanent, deprivation of human liberty." *Id.* at 692. To avoid these problems, the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation." *Id.* at 682.

Despite the Court's recognition of the significant constitutional problems posed by indefinite detention under the statute, the United States Immigration and Customs En-

forcement (ICE)—the successor agency to the Immigration and Naturalization Service (INS)—has interpreted *Zadvydas* narrowly and continues to assert that it may detain "arriving aliens" indefinitely after the entry of a removal order.[2] *See* Pet. Br. at 32-43. Moreover, the government treats Mariel Cubans as "arriving aliens" even though they were paroled into the country almost 25 years ago. 8 C.F.R. § 241.13(b)(3). In particular, the ICE still holds "[a]pproximately 750" Mariel Cubans in indefinite detention. *See* Pet. Br. at 8.

2. The Cuban Review Plan. The *Zadvydas* Court recognized that the constitutionality of any scheme authorizing indefinite—potentially permanent—detention hinges in large part on the availability of meaningful procedures that assure that detention is appropriately limited. *Zadvydas*, 533 U.S. at 690-692. For Mariel Cubans awaiting removal, the administrative scheme used to decide whether to continue detention indefinitely—the Cuban Review Plan (Plan)—is set out in 8 C.F.R. § 212.12. With some minor exceptions, these procedures are identical to those already determined to be of questionable constitutional sufficiency in *Zadvydas*. Like the procedures there, the Plan grants the ICE's Associate Commissioner for Enforcement (Commissioner) essentially unfettered discretion to decide whether a Mariel Cuban awaiting removal will remain imprisoned or be released on immigration "parole." *See id.* §§ 241.4(b)(2), 212.12(b).[3]

Without limiting the Commissioner's discretion, the Plan establishes an internal ICE administrative process to provide the Commissioner with a purely advisory recommendation. *Id.* § 212.12(c), (d). This recommendation is based first on a

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2 This brief will use the term "ICE" when referring to both the ICE and the former INS.

3 Moreover, as they are not required by the statute, nor, in the government's view, by the Constitution, *see* Pet. Br. at 15-24, the Cuban Review Plan procedures could be rescinded at any time.

review of the detainee's file by the Director of the Plan (Director), which, unless the Director recommends release, is followed by a brief interview conducted by two ICE officers (typically deportation officers). *Id.* § 212.12(d)(1), (4)(i)-(ii). The interview may be scheduled at any time after the record review, with no required notice to the detainee.[4] *Id.* This interview is the only time a detainee has any input in the review process.

One other person may accompany the detainee to the interview. *Id.* § 212.12(d)(4)(ii). However, the detainee has no right to appointed counsel, and the regulations do not provide for an attorney's participation at the interview even if one is present. At the interview, a detainee may submit any information supporting release, but the regulations do not guarantee the detainee the opportunity to review or dispute the contents of his file or to review the recommendation of the Director. *Id.* Nor is the detainee entitled to subpoena relevant information or present or examine witnesses. *Id.* No transcript of the interview is produced.

The interviewing officers must recommend detention unless they conclude that the detainee is (i) presently nonviolent, (ii) likely to remain nonviolent, (iii) unlikely to pose a threat to the community following release, and (iv) unlikely to violate the conditions of release. *Id.* § 212.12(d)(2)(i)-(iv). Although the Plan lists several factors to be considered,[5] *id.*

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4 While the government suggests that the ICE is required to provide notice prior to an interview, *see* Pet. Br. at 6, 45, the two regulations it cites do not support that assertion. *See* 8 C.F.R. § 212.12 (no mention of notice); 8 C.F.R. § 241.4(h)(2) (requiring notice in release procedures for other indefinite detainees that explicitly do *not* apply to Mariel Cubans (*id.* § 241.4(b)(2)). *See also Caballero* v. *United States*, 145 F. Supp.2d 550, 558 (D.N.J. 2001) (finding no right to notice under Cuban Review Plan).

5 These factors include disciplinary infractions, criminal history, mental health, progress in education programs, ties with the United

§ 212.12(d)(3)(i)-(vii), it specifies no standard of proof, and the burden is placed on the detainee to show that he should be released.[6] Pet. Br. at 45. Even if the detainee satisfies these criteria, the panel is not required to recommend release.

Upon receipt of the interviewers' recommendation, 8 C.F.R. § 212.12(d)(4)(iii), the Commissioner makes the final decision whether to keep the alien in prison or to grant release on "parole." *Id.* §§ 212.12(b)(1), 212.12(g). That decision is left completely to the Commissioner's discretion and is made without the benefit of any record of the interview other than a summary prepared by the officers. *See* Mark Dow, *American Gulag* 297 (2004) ("*American Gulag*"). Detainees have no opportunity to review the officers' recommendation or to rebut it.

If the Commissioner continues detention, the detainee is provided a decision that "briefly set[s] forth the reasons for the continued detention." 8 C.F.R. § 212.12(b)(1). These decisions are typically one-page documents, containing mostly boilerplate language.[7] First, the letter informs the

States, likelihood of absconding, and other "relevant" information. *Id.* § 212.12(d)(3)(i) (vii).

6 Decisions denying release indicate that the detainee bears the burden of showing that he is "clearly" entitled to be released. *See, e.g.*, Petitioner's Response to Respondents' Status Report and Objection to the Report & Recommendation, Ex. C, Final Notice of Parole Denial, *Aguilar* v. *Ashcroft*, No. C-01-1328-R (W.D. Wash. Apr. 8, 2002) (Final Notice of Parole Denial) (continuing detention where "it is NOT clearly evident that" detainee entitled to parole).

7 The "Final Notice of Parole Denial" usually follows a distinct, four-paragraph form, as discussed above. For examples of such notices, *see* Excerpts of Record at 82, 83, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002); Excerpts of Record at 69-72, *Aristica-Rodriguez* v *INS*, No. 01-16398, 45 Fed. Appx. 787 (9th Cir. 2002); Response to Order to Show Cause, Exs. H1-H9, *Benites-Broches* v. *Hedrick*, No. 01-3022-CV-S-1-H (W.D. Mo.

detainee that parole has been denied, citing the applicable regulations. Second, the letter recites that the Commissioner made the decision "[a]fter carefully weighing all of the factors for and against parole." Third, in the sole paragraph personalized to the detainee, the Commissioner proffers some basis for the decision, usually relying on one or more stock phrases relating to criminal history or credibility.[8] Finally, the letter says that the process will begin again within a year.

The Commissioner's detention decision is final and no direct judicial review is available. In fact, even in habeas challenges, the government has argued that detention decisions are either completely immune from review, *see, e.g.*, Brief for Appellee at 21-22, *Moreno-Peña* v. *INS*, No. 01-17309, 2002 WL 32112834 (9th Cir. June 27, 2002), or subject to extremely deferential review. *See* Brief for Respondent-Appellee at 11, *Navarro* v. *INS*, No. 01-15111, 2001 WL 34104336 (9th Cir. Aug. 7, 2001) (court "may only determine whether the [ICE] has advanced a 'facially legitimate and bona fide reason' to support its decision").

If the Commissioner decides to authorize release, suitable sponsorship is required before the detainee may be released.

Dec. 5, 2001); Respondent's Answer, Ex. 1 at 11-14, 32, *Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001); *see also* Brief for Appellant at 7, *Bauta-Varona* v. *INS*, No. 011504, 2001 WL 34354609 (9th Cir. Sept. 6, 2001) (notice was "word for word" the same as previous year's notice).

8 *See, e.g.*, Response to Order to Show Cause, Ex. H2, *Benites-Broches* v. *Hedrick*, No. 01-3022-CV-S-1-H (W.D. Mo. Dec. 5, 2001) ("You have demonstrated a propensity to engage in assaultive, violent criminal activities."); Respondent's Answer, Ex. 1 at 12, 29, *Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001) ("In addition, your responses to questions presented for discussion by the Cuban Review Panel were found to be non-credible."); Excerpts of Record at 82, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002) (same).

8 C.F.R. § 212.12(f). And, if sponsorship is unavailable, the detainee remains in jail—sometimes for years—notwithstanding that release has been authorized. *See infra*, n. 29. Moreover, at any time before or after release, the Commissioner may withdraw approval for release, and the alien will remain in or be returned to jail. 8 C.F.R. § 212.12(e).

If the Commissioner denies release, the process begins again within a year of that decision. *Id.* § 212.12(g)(2).

SUMMARY OF ARGUMENT

The only thing currently standing between Mariel Cuban detainees and the possibility of life imprisonment is an administrative scheme that vests virtually unfettered, and largely unreviewable, discretion in the hands of one administrative official. The Cuban Review Plan denies detainees the most basic protections required before the government can infringe on far lesser interests and fails to provide the safeguards against arbitrary detention that are essential before an indefinite detention scheme can pass constitutional muster under any standard. Predictably, the Plan regularly results in arbitrary and sometimes bizarre results for Mariel Cuban detainees who, deprived of counsel and without access to meaningful and impartial review, remain imprisoned for years after completion of their criminal sentences.

ARGUMENT

I. THE CUBAN REVIEW PLAN DEPRIVES DETAINEES OF FUNDAMENTAL DUE PROCESS PROTECTIONS AND GRANTS AN ADMINISTRATIVE OFFICIAL VIRTUALLY UNFETTERED DISCRETION OVER LIBERTY INTERESTS.

As this Court recognized in *Zadvydas,* freedom from physical restraint is a fundamental liberty interest protected by the Due Process Clause. *Zadvydas*, 533 U.S. at 690 (citing *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992)). Nonetheless,

in narrow circumstances, such as where there is an identifiable need to protect the community or where a person presents a dangerous mental illness, the government's interest in detention may outweigh an individual's right to be free. *Id.* at 690; *United States* v. *Salerno*, 481 U.S. 739, 748-752 (1987). *Indefinite* detention, however, involves a heightened intrusion of a person's liberty, and thus is justified only in the rarest of circumstances. *See Zadvydas*, 533 U.S. at 691, 692; *Foucha*, 504 U.S. at 81-83.[9]

This Court has never approved an indefinite detention scheme that applies as broadly as the one at issue here, yet is so lacking in basic procedural safeguards, such as the right to counsel, a neutral decisionmaker, the availability of judicial review, the right to confront adverse evidence, a clear standard of proof, and the placement of the burden of proof on the government. *See Zadvydas,* 533 U.S. at 692. In fact, this Court has found that due process requires much more before much less can be taken.

One such example is parole revocation. *See Id.* at 723 (Kennedy, J., dissenting) (suggesting that release procedures for aliens indefinitely detained pending removal can be informed by parole revocation cases). In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held that parole revocation procedures, at a minimum, must include: (1) written notice of the claimed violation, (2) disclosure to the parolee of the evidence against him, (3) opportunity to be heard and to present witnesses and evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a "neutral and detached" hearing body, and (6) a written statement by the factfinders as to the evidence relied on and reasons for

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[9] *See also Rasul* v. *Bush*, 124 S. Ct. 2686, 2700 (2004) (Kennedy, J., concurring) (noting significance of fact that detention indefinite); *Foucha*, 504 U.S. at 86-87 (O'Connor, J., concurring) (same); *Demore* v. *Kim*, 538 U.S. 510, 528-529 (2003) (emphasizing distinct concerns triggered by indefinite detention).

revoking parole. *Id.* at 489. *See also Gagnon* v. *Scarpelli*, 411 U.S. 778, 782, 786 (1973) (applying same standards to probation revocation proceedings and requiring appointed counsel in some cases); *Vitek* v. *Jones*, 445 U.S. 480, 496 (1980) (requiring similar safeguards to transfer prisoner to mental institution).

Importantly, parole revocation involves a significantly *lesser* interest than that which is at stake here: in parole revocation proceedings a person may be returned to prison to complete a determinate criminal sentence imposed after receiving all of the protections of the criminal justice system. In contrast, Mariel Cubans detained pursuant to the Cuban Review Plan have already completed their criminal sentence and now face added, potentially indefinite, imprisonment imposed solely by an administrative officer. Nonetheless, the parole revocation procedures required by *Morrissey* provide numerous safeguards unavailable to detainees here.

Similarly, the Department of Defense has implemented many of the *Morrissey* safeguards in the plan for reviewing the status of foreign nationals detained as enemy combatants. *See* Deputy Secretary of Defense, Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) ("DOD Memo."). Prompted by this Court's decision in *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004), the Department's plan calls for timely notice to the detainee, adjudication by a neutral tribunal, the creation of a record (including a recording of the proceedings), appointment of a representative with access to the record, the right to call and confront witnesses, the right to testify and introduce evidence, and a written report of the decision.[10] *See* DOD Memo., *supra*. The plan also sets out a clear standard of

[10] The Department's plan essentially adopts the procedures outlined by the Court in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2648-50 (2004) (plurality opinion) (reviewing legality of process for detaining United States citizens as enemy combatants).

proof and provides that the detainee shall be informed of his right to seek a habeas review. *Id.* Therefore, putative enemy combatants are afforded substantially more procedural safeguards than Mariel Cubans who have lived in this country for almost 25 years and who pose no greater threat than other criminals who have served their sentences and been released back into the community.

The Cuban Review Plan is even less protective than the statute authorizing detention of aliens who are certified as potential terrorists. *See* 8 U.S.C. §§ 1226a(a)(6)-(7), (b). Under that statute, aliens who are ordered removed but whom the government is unlikely to remove in the foreseeable future may be detained "*only if* the release of the alien will threaten national security of the United States or the safety of the community or any person." *Id.* § 1226a(a)(6) (emphasis added). In contrast, Mariel Cubans who are found to pose *no* threat to the community can continue to be detained indefinitely, in the sole discretion of the Associate Commissioner. 8 C.F.R. § 212.12(b). In addition, the procedural protections are greater for aliens detained as terrorists under § 1226a. The Attorney General must review both the terrorist certification and the detention decision every six months. 8 U.S.C. § 1226a(a)(7). The statute also provides that judicial review of terrorist certification and detention decisions is available through habeas corpus proceedings. *Id.* § 1226a(b).

Even where a person may be deprived of an interest far less significant than physical freedom, this Court has required many of the same safeguards. For example, this Court's decisions recognize the importance of counsel in ensuring that the procedures comport with due process. *See Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1985) (right to counsel in welfare termination hearing); *Mathews* v. *Eldridge*, 424 U.S. 319, 339 (1976) (same in social security hearing). And where greater liberty interests are present—particularly where a person is deprived of physical liberty—due process

may demand that counsel be provided.[11] Yet Mariel Cuban detainees subject to indefinite detention are not provided counsel, nor are they even guaranteed that retained counsel will be permitted to assist them during interviews.

Also, the Plan places the burden on the detainee to show that he should not be detained indefinitely,[12] and, even then, no judicial officer passes on the propriety of the detention.[13] Instead, the Plan leaves the detention decision to the discretion of an administrative official who hardly qualifies as "neutral and detached." *Morrissey*, 408 U.S. at 489. As the *Hamdi* Court held, "[a]n interrogation by one's captor * * *

[11] *See Salerno*, 481 U.S. at 751 (appointment of counsel for pre-trial detention); *Vitek*, 445 U.S. at 497 (plurality opinion) (same for transfer of prisoner to mental institution); *Gagnon* v. *Scarpelli*, 411 U.S. at 786-787 (same for probation revocation proceeding); *In re Gault*, 387 U.S. 1, 41 (1967) (same where juvenile detained). Appointed counsel may even be required where non-custodial liberty is at stake. *See Lassiter* v. *Dep't Soc. Servs.*, 452 U.S. 18, 25-28 (1981) (termination of parental rights).

[12] *See Zadvydas*, 533 U.S. at 692; *Foucha*, 504 U.S. at 81-82 (striking civil confinement statute because burden on detainee).

[13] *See Kansas* v. *Crane*, 534 U.S. 407, 411 (2002) (jury trial for civil commitment of sex offender); *Salerno*, 481 U.S. at 751 (judicial officer for pre-trial detention). In the immigration context, this Court noted the significance of potential review before a neutral immigration judge in approving pre-hearing detention procedures. *Reno* v. *Flores*, 507 U.S. 292, 308, 309 (1995) (noting that immigration judge is "quasi-judicial officer" independent of enforcement agency).

This Court also has indicated judicial review may be required of an administrative decision implicating fundamental rights. *Zadvydas*, 533 U.S. at 692. *See also Hamdi*, 124 S. Ct. at 2648 (even in wartime, courts have an important role). Such review must be more searching than whether the government's "articulated basis was a legitimate one." *Id.* at 2645.

hardly constitutes adequate factfinding before a neutral decisionmaker." 124 S. Ct. at 2651.

Furthermore, the Court has held that the decision to deprive a person of liberty must be based on clear legal standards and evidence contained in the record. *See Goldberg*, 397 U.S. at 271. "To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on." *Id.* (citations omitted). Such a statement of reasons facilitates judicial review. *Dunlop* v. *Bachowski*, 421 U.S. 560, 573-574 (1975). Boilerplate decisions, like those typically provided to Mariel Cubans, combined with the lack of any record of an interview other than the interviewers' own meager summary, fail to satisfy the dictates of due process.[14]

In all of these important respects, the Cuban Review Plan falls far short of the procedures that this Court has required where similar, or even less significant, interests are at stake. As explained below, these deficiencies have resulted in the arbitrary deprivation of the liberty of the respondent and hundreds of other Mariel Cubans.

II. THE EXPERIENCE OF MARIEL CUBANS IN DETENTION ILLUSTRATES THE INADEQUACIES OF THE CUBAN REVIEW PLAN.

While each of these deficiencies is significant in itself, the combined result is an administrative scheme that fails to provide even minimal due process protections and routinely

[14] *See Llana-Castellon* v. *INS*, 16 F.3d 1093, 1098 (10th Cir. 1994) (boilerplate decision may violate due process, citing *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 36 (7th Cir. 1992)); *Castillo* v. *INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (boilerplate decisions deny individualized review and impede judicial review); *cf. Khouri* v. *Ashcroft*, 362 F. 3d 461, 466, 467 (8th Cir. 2004) (lack of developed record impedes review); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002) (lack of reasoned decision impedes review).

produces arbitrary outcomes. As a result, many Mariel Cubans who would otherwise be free from custody remain in immigration imprisonment serving potential life sentences.

Not surprisingly, the inadequacies of the Plan have not gone unnoticed. In 2001, the Inter-American Commission on Human Rights of the Organization of American States ("Human Rights Commission") issued a report in a case brought on behalf of more than 300 Mariel Cubans and several human rights organizations. *Ferrer-Mazorra* v. *United States,* Inter-American Comm'n on Human Rights, Organization of American States, Report No. 51/01, Case No. 9903 (Apr. 4, 2001) ("*Human Rights Report*"). The Commission concluded that the detention of Mariel Cubans under the Cuban Review Plan violated the United States' obligations under the American Declaration of Rights and Duties of Man. *Id.* ¶¶ 1-3, 251. The Commission identified four principal reasons why that was so:

> [The procedures] fail to define with sufficient particularity the grounds upon which the petitioners have been deprived of their liberty; they place the onus upon the detainee to justify his or her release; they are subject to a degree of discretion on the part of officials that exceeds reasonable limits; and they fail to provide for detention reviews at reasonable intervals. [*Id.* ¶ 221.]

The experience of practitioners confirms these and other problems. *See, e.g.*, Letter from Post Conviction Justice Project at Univ. of S. Cal. Law Sch. to Director of INS Policy Directives and Instructions Branch (July 27, 2000) ("*Justice Project Letter*"), *available at* http://lawweb.usc.edu/users/nfrenzen/INS_Letter_7.27.2000. pdf (criticizing limits on access to and participation of counsel, lack of access to records, inadequate notice, unqualified administrative officials, over-reliance on criminal history, and untimely reviews); *see also* Karla Harr, *Mariel Cubans: The Forgotten Lifers*, 4 Bender's Immigr. Bull. 1109, 1111-12 (Dec. 1, 1999) ("*Forgotten Lifers*"). In particular, "almost all of the

Mariels are unrepresented," and lack of access to records and inadequate notice prevent effective representation even for those detainees who do have counsel. *Forgotten Lifers*, *supra*, at 1111-12; *see also Justice Project Letter*, *supra*, at 4-6. The result of these deficiencies is that "[m]any detainees serve much longer in INS detention than they did for the criminal charge which is the basis for removal."[15] Helen Morris, *Detention Reviews for Long-Term Detainees*, 4 Bender's Immigr. Bu!l. 610, 611 (June 15, 1999) ("*Detention Reviews*").

The examples of how these deficient procedures have affected detainees similarly situated to the respondent represent just the tip of the iceberg, as they are based only on court records of those who managed to mount habeas challenges to their detention. The vast majority of Mariel Cubans in indefinite detention, however, have no representation and no

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15 *See, e.g.*, Supplemental Brief for Petitioner-Appellant, *Carballo* v. *Luttrell*, No. 99-5698, at 5 (6th Cir. Jan. 16, 2002) (appellant had been "incarcerated by the INS for more than 14 years, more than twice as long as he was required to serve for the crimes that led to his exclusion order"); Brief for Appellant, *Cespedes-Leon* v. *Smith*, No 02-35877, at 5 (9th Cir. Nov. 2002) (appellant sentenced to three to nine years for crimes, but held in ICE custody for 17 years); *Justiz-Cepero* v. *INS*,, No. 3:02-CV-2305-K, 2004 WL 915612, at *1 (N.D. Tex. Apr. 24, 2004) (detained for 13 years); *see also Justice Project Letter*, *supra*, at 2 (noting that of a survey of 67 Mariel Cuban clients, over 60% had served sentences of five years or less for their crimes, but almost 90% had served an additional six or more years in ICE detention); *Forgotten Lifers*, *supra*, at 1111 (noting that, of 66 Mariel Cuban clients, 22 had been in ICE custody for over five years and six had been in detention over 10 years); *American Gulag*, *supra*, at 294, 299 (describing detainee still in detention after completing a two-year marijuana sentence in 1984; detainee held for eight additional years after completing a seven-year sentence; and detainee who has been incarcerated since completing a 14-month marijuana sentence in 1997).

effective means of exposing the problems they experience under the Plan.

A. The Decision to Continue Indefinite Detention Is Made by Immigration Officials, Rather Than Impartial Decisionmakers, and Is Not Subject to Meaningful Oversight or Judicial Review.

For all of the pomp and circumstance in the Cuban Review Plan concerning annual interviews and various levels of review, the only decision that matters—whether to release a Mariel Cuban detainee or continue detention indefinitely—rests in the virtually unfettered discretion of one administrative official, the Commissioner. The Commissioner, who is charged with the duty of removing aliens from this country, is hardly an "impartial" decisionmaker.[16] He is free to accept or reject panel recommendations as he sees fit, without explaining departures from those recommendations and without creating any other meaningful record concerning the reasons for continuing detention. And, as we have explained, the government has argued that the Commissioner's decision is either completely unreviewable or is subject to extremely deferential review by a habeas court.[17] *See supra*, at 7. In

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[16] *See, e.g.*, *Phan* v. *Reno*, 56 F. Supp. 2d 1149, 1157 (W.D. Wash. 1999) (*en banc*) (" 'Due to political and community pressure, the INS, an executive agency, has every incentive to continue to detain aliens with aggravated felony convictions, even though they have served their sentences.' ") (citation omitted); *Duong* v. *INS*, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000) (finding a due process violation because potentially biased ICE officers made the final parole decision rather than an "impartial party such as a judge or jury"); *Ekekhor* v. *Aljets*, 979 F. Supp. 640, 644 (N.D. Ill. 1997), *appeal dismissed as moot*, 172 F.3d 53 (7th Cir. 1998) (finding ICE officials to be potentially biased and requiring an impartial Immigration Judge to make parole determinations).

[17] The Human Rights Commission said that it could not "overemphasize the significance of ensuring effective supervisory control over detention as an effective safeguard, as it provides effective assurances that the detainee is not exclusively at the mercy of the detaining authority." *Human Rights Report*, *supra*, at ¶ 232. The Commission found that the "limited nature and scope of judicial control" available by habeas courts was insufficient. *Id.* at ¶ 233.

any event, meaningful review of the Commissioner's decision, to the extent available at all, is frustrated by the nearly complete lack of a record or explanation of his decision.

This wholly inadequate scheme results in arbitrary decisions that force Mariel Cubans to sit in jail for years longer than necessary. For example, Eduardo Dominguez, who came to the United States during the Mariel boatlift, was detained in a federal prison for six years despite repeated recommendations of release. *See Dominguez* v. *DeMore*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001).

The ICE detained Mr. Dominguez in November 1994 after he completed his two-year sentence for a false imprisonment conviction stemming from a domestic dispute with his ex-girlfriend. *Id.* In 1995, the Commissioner refused release, citing the false imprisonment conviction. Respondent's Answer, Ex. 1 at 11, *id.* In 1996, although the panel recommended Mr. Dominguez' release, the Commissioner refused release, citing the now three-year-old false imprisonment conviction and a nine-year-old juvenile conviction. Oddly, the ICE officials who interviewed Mr. Dominguez found his answers credible, but the Commissioner—who had never met him—reached the opposite conclusion.[18] *Id.* at 12, 29-31.

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[18] Credibility determinations are frequently cited by the Commissioner in denying parole. Such credibility determinations are extremely difficult for detainees to overcome. For example, in several reviews, Mr. Reynero Arteaga Carballo was denied parole because of his purported failure to accept responsibility for his crimes. *See* Supplemental Brief for Petitioner-Appellant at 22-23, *Carballo* v. *Luttrell*, No. 99-5698 (6th Cir. 1999). In 1997, however, when Mr. Carballo expressed remorse during an inter-

Again in 1997, the panel recommended release, and again the Commissioner rejected that recommendation. *Id.* at 32; Petitioner's Traverse and Memorandum of Law in Support, Ex. G, *Dominguez* , No. CV 00-1040-PA (D. Or. Jan. 19, 2001).

In 1998, the panel's release recommendation (its *third*) became even more emphatic, suggesting that Mr. Dominguez be released "as soon as possible" and lauding his academic and vocational achievements while detained. *Id.* Ex. H. However, the Commissioner, without mention of Mr. Dominguez' achievements, again refused release citing the now five- and 11-year-old convictions. Respondent's Answer, Ex. 1 at 14, *Dominguez*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001). And in 1999, the panel highly recommended that Mr. Dominguez be released with only a modicum of supervision, concluding that he was "totally rehabilitated," so academically ambitious that he had exhausted all of the classes available, and so non-violent that he refused to defend himself when assaulted by another prisoner. *Id.* at 35-37. The Commissioner again refused release on the grounds that Mr. Dominguez was still a violent threat due to his prior convictions.[19] *Id.* at 13.

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view, the panel found him non-credible, calling his remorse a "new tactic" and an attempt to play "the age angle." *Id.* at 22. The panel made this determination despite numerous psychological evaluations that determined Mr. Carballo was ready to be released. *See id.* at 7. As the Post Conviction Justice Project noted, the Plan places detainees in a precarious position by considering credibility and remorsefulness alongside dangerousness. If a detainee seeks to explain his crimes in the most positive light, he risks adverse determinations concerning credibility and remorsefulness. If he does not, however, continued detention based on criminal history is likely. *See Justice Project Letter*, *supra*, at 7.

19 The Commissioner further justified the decision by reference to a disciplinary citation—the only one in five years of detention—for refusing to obey an order. *Id.* The panel who interviewed Mr. Dominguez mentioned this citation in passing and found it irrelevant. *Id.* at 36.

Each year, despite increasingly glowing recommendations from the Cuban Review Panel, the Commissioner refused release because of Mr. Dominguez' criminal record. *See id.* at 11-14, 32. The only notification provided to Mr. Dominguez each year was the Commissioner's "Final Notice of Parole Denial"—a document that did not inform Mr. Dominguez of the favorable recommendations by the panels, but instead denied release using boilerplate language. *See id.* at 13-14, 32. When Mr. Dominguez finally received a fair hearing by an impartial decisionmaker through his habeas action, the assessment of his case was strikingly different. The court immediately released Mr. Dominguez, finding that the Commissioner had abused his discretion and acted arbitrarily by denying parole.[20] *See Dominguez*, No. CV 00-1040-PA (D. Or. Jan. 19, 2001). By then Mr. Dominguez had already been imprisoned for an additional six years after serving a two-year sentence.

Enrique Acosta Delgado's case further demonstrates the capriciousness of the officials who administer the Plan. The Commissioner first denied parole to Mr. Delgado in 2000, citing petty institutional infractions such as "refusing to turn over a comb" and "refusing to get into the chow line."[21]

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20 Mr. Dominguez represents one of the rare cases in which a district court has found itself able to explore in a meaningful way the facts and circumstances of a Mariel Cuban's detention. In most cases, like that of Manuel Navarro discussed below, habeas courts hardly progress past the extremely deferential standard of review urged by the government.

21 Disciplinary citations are another frequent and virtually unassailable basis used by immigration officials to justify continued detention. *See, e.g., Sierra* v. *INS*, 258 F.3d 1213, 1216 (10th Cir. 2001) (indicating Commissioner withdrew approval for parole because detainee was disciplined for fighting while awaiting release, even though the citation was being administratively

Excerpts of Record at 82, *Delgado* v. *INS*, No. 02-16526 (9th Cir. filed Aug. 6, 2002). The following year, Mr. Delgado was scheduled for an interview before the Director himself, who was training other officials in the interview process. *See id.* at 78. After some questions about his family situation, criminal history, and the events surrounding his custody, the Director said: "I have two words: 'mierda' and 'porqueria.' Bullshit and shit." *Id.* at 78-79 (declaration of attorney present at interview). The Director then berated Mr. Delgado for his past conduct and informed him that, "If you don't have any family, you belong to us." *Id.* at 79. When Mr. Delgado received his parole decision, signed by the same Director, it denied release.[22] *Id.* at 83.

Even when a detainee's case is reviewed by an impartial decisionmaker through a habeas corpus petition, the inadequacies of the Cuban Review Plan are often not subjected to meaningful review, both because of the highly deferential standard of review and the lack of a reviewable record. For example, Manuel Navarro was detained by the ICE from

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appealed on grounds of self-defense); *see also Forgotten Lifers*, *supra*, at 1114 (noting problems with reliance on incident reports). Similarly, although chastised by some courts and commentators, ICE officials often cite to arrests, as opposed to convictions, in support of continued detention. *See Chavez-Rivas* v. *Olsen*, 207 F. Supp.2d 326, 340 (D. N.J. 2002) (continued detention based on arrest without conviction violates due process); *Justice Project Letter*, *supra*, at 7 ("some panel members hold an arrest or a dismissed charge at the same level as a criminal conviction").

22 Under the regulations, the parole decision is made by the Commissioner or his designee. 8 C.F.R. § 212.12(b)(1)-(2). Since 1987, the Director has had the "privilege of making the parole decisions," thereby vesting most of the review process in one person. *See* Supplement to the Record, Deposition of John Castro at 14, *Suarez-Tejeda* v. *United States*, No. CIV-01-96-F (W.D. Okla. May 24, 2002). As a result, every stage of Mr. Delgado's review was performed by a single person—the Director.

1997 to 2002 and was interviewed only once—and then only at the prompting of counsel who had been appointed after he filed his habeas petition. *Navarro* v. *INS*, No. CV 99-01025-WBS(DAD), slip op. at 2-3 (E.D. Cal. Dec. 8, 2000); Joint Statement Regarding Agreed Upon Facts at 3, *id.*[23] After his single interview, the Commissioner denied parole, citing only Mr. Navarro's criminal convictions—the most recent of which was 11 years old. Excerpts of Record at C, *Navarro* v. *INS*, No. 01-15111, 39 Fed. Appx. 513 (9th Cir. Apr. 8, 2002); Joint Statement Regarding Agreed Upon Facts at 3-4, *Navarro*, No. CV 99-01025-WBS(DAD) (E.D. Cal. Dec. 8, 2000).

On habeas review—the only court review available—the ICE argued that "[i]n reviewing a denial of immigration parole, this Court may not substitute its judgment for the [ICE's] and may only determine whether the [ICE] has advanced a 'facially legitimate and bona fide reason' to support its decision to deny immigration parole to Mr. Navarro." Brief for Respondent-Appellee at 11, *Navarro* v. *INS*, No. 01-15111 (9th Cir. Apr. 8, 2002). The court accordingly took judicial notice of the Commissioner's decision to deny parole, and—although there was no meaningful record to review—simply assumed that the Commissioner considered factors other than the prior convictions. Excerpts of Record at C, *Navarro*, No. 01-15111 (9th Cir. Apr. 8, 2002). The court did this even though the only reference to other factors in the parole denial decision was a statement that the Commissioner had "carefully weigh[ed] all of the factors for and against parole." *Id.* This language is part of the form letter that appears to be used for every parole denial in the United States. Unable to secure meaningful administrative

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23 The following year, despite his counsel's urging and his pending habeas case, Mr. Navarro was unable to secure an interview. Letter from Daniel J. Broderick, Chief Assistant Federal Defender, to John Castro, Cuban Review Plan 1 (Sept. 25, 2001) (on file with counsel of record).

review, Mr. Navarro's attempts to receive impartial consideration from a court were ultimately thwarted by the lack of a record and a standard of review so deferential that it relied upon boilerplate language from a form letter.

* * *

Mariel Cubans find themselves playing against a stacked deck in trying to convince the ICE—or more particularly the Commissioner or his designee the Director—that they should not be held indefinitely. Given the limited oversight and review by judicial or other impartial authorities, arbitrary parole decisions are common.

B. The Cuban Review Plan Places the Burden on the Detainee to Satisfy Vague Standards to Avoid Indefinite Detention, but Denies the Detainee Any Meaningful Opportunity to Satisfy that Burden.

The Cuban Review Plan strays still further from the mandates of due process by placing the burden on the detainee to show that he should not be detained indefinitely, and then depriving him of any reasonable way to satisfy that burden. A detainee bears the burden of clearly demonstrating that he is "presently a nonviolent person," is "likely to remain a nonviolent person," is "not likely to pose a threat to the community following his release," and is "not likely to violate the conditions of his [release]." *See* 8 C.F.R. § 212.12(d)(2)(i)-(iii). "[R]eviews are conducted based upon a presumption of detention, which the detainee must rebut based on evidence of a bona fide change in his or her circumstances." *Human Rights Report*, *supra*, at ¶ 228. Yet, "the Regulations do not prescribe specific factors defining when a detainee may be considered 'violent' or a 'threat to the community,' much less how future conduct in this regard is to be predicted." *Id.* ¶ 223. Such standards—"on their face vague, speculative and open to various interpretations"—create an "unacceptable risk of inconsistency in decision-

making" and fail to provide "sufficient notice of the case [detainee] must meet in order to justify [his] release." *Id.*

On top of all that, the Plan ties the hands of the detainee in a manner that makes the satisfaction of these ill-defined standards even more difficult. Mariel Cubans are not guaranteed access to their records and are not provided with other means to obtain relevant information, such as through subpoena or discovery mechanisms. Nor are Mariel Cubans provided the assistance of counsel in navigating the Plan.[24]

The case of Jorge Suarez-Sanchez shows the difficulties a detainee faces in proving that he should not be detained indefinitely. After arriving in the United States in June 1980, Mr. Sanchez was paroled into the country and eventually settled in California, where he worked as a migrant farmer. *See* Petitioner's Exhibit in Support of Petitioner's Traverse and Memorandum of Law, Ex. B at MC 2095-97, *Suarez-Sanchez* v. *Smith*, CV No. 01-377-PA (D. Or. Apr. 22, 2003). After becoming blind in one eye and becoming severely myopic in the other, Mr. Sanchez stopped working and began receiving disability. *See id.* at MC 2096.

In May 1999, Mr. Sanchez was released from state custody after completing a two-year sentence for failing to register as

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[24] Most Mariel detainees lack resources to retain counsel. *See Forgotten Lifers*, *supra*, at 1112 (identifying "lack of financial resources, limited availability of pro bono attorneys, [and] geographical location of the detention facility" as common obstacles to obtaining legal representation). The problem of access to counsel is exacerbated by the fact that ICE only allows detainees to bring one person with them to their panel interviews, *see* 8 C.F.R. § 212.12(d)(4)(ii), thereby forcing detainees to choose between bringing a legal representative or a witness. *See, e.g.*, Excerpts of Record at 78, *Delgado*, No. 02-16526 (9th Cir. filed Aug. 6, 2002) (declaration from detainee's attorney noting that his client, like other Mariels, was allowed to have only one person accompany him to interview).

a sex offender based on two convictions for indecent exposure while urinating in public.[25] Nonetheless, he remained imprisoned by the ICE for an additional four years, winning his release under conditions of supervision only when a district court found that his continued indefinite detention violated this Court's decision in *Zadvydas*. *See Suarez-Sanchez* v. *Smith*, No. CV 01-377-PA (D. Or. Apr. 22, 2003) (relying on *Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002)).

At the time he filed his habeas corpus petition, Mr. Sanchez had received only one "annual" interview by the ICE in three years of custody.[26] The immigration officers who interviewed Mr. Sanchez at that time recommended against his release because they were "unable to conclude" that he was "not likely to pose a threat to the community" and "not likely to violate conditions of his parole."[27] *See* Excerpt of Record at MC 2097, *id.* In support of their recommendation, the officers cited four reasons: first, that Mr. Sanchez was "not credible" because of alleged discrepancies between his claims about his criminal history in Cuba and the information

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25 Mr. Sanchez was convicted of a number of criminal offenses, most involving petty theft and/or drugs, and the majority of which resulted in probation. *See id.* at MC 2095. Mr. Sanchez' only violent crime resulted in probation. *See id.* In 1987, Mr. Sanchez was convicted of two drug-related felonies. *See id.*

26 Mr. Sanchez is not alone in having received reviews less frequently than required. *See* Allison Davenport & Laurie Joyce, *Indefinite Detainees: In Definite Need of Legal Representation*, 9 Bender's Immigration Bulletin 188, 190 n.6 (Feb. 15, 2004) (noting that "reviews are often severely delayed," and that a district court had certified a class in a case challenging the "practice of delaying custody reviews" (citation omitted)).

27 These vague standards create the possibility that a Mariel Cuban could be detained indefinitely just because the interviewers believe that he is likely to commit petty crimes if released. Therefore, a nonviolent, recidivist shoplifter could potentially be subjected to life imprisonment by the ICE.

in his file; second, that he "ha[d] an extensive history of arrests and convictions" for crimes of "violence, sex and drugs"; third, that he had failed to work for an extensive period of time or to learn a trade or improve his English skills; and finally, that his failure to comply with California's sex offender registration requirements—imposed as a consequence of his convictions for urinating in public—indicated that "he would fail to fulfill the requirements of [p]arole with the INS." *See id.*

Notably, the panel did not suggest that Mr. Sanchez was either currently violent or likely to be violent in the future. *Id.* Rather, its recommendation was based on the interviewers' reluctance to conclude that Mr. Sanchez was "not likely to pose a threat to the community" and "not likely to violate conditions of his parole." *See id.*

One month later, the Commissioner denied release, concluding that Mr. Sanchez had "demonstrated a propensity to engage in recidivist criminal behavior as reflected by [his] criminal record." *Id.* at MC 2090, from Petitioner's Exhibit in Support of Petitioner's Traverse and Memorandum of Law, *Suarez-Sanchez* v. *Smith*, CV No. 01-377 (D. Or. 2001). The Commissioner's decision also cited the panel's credibility finding. *See id.*

Mr. Sanchez' case demonstrates the heavy, often insurmountable, burden faced by Mariel Cuban detainees seeking release. First, although the panel's credibility finding was based on alleged discrepancies between Mr. Sanchez' recollection of his criminal history and what appeared in his file, it is not clear whether there truly was any conflict,[28] or

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28 Although Mr. Sanchez reported convictions in Cuba for vagrancy and *peligrosidad* ("dangerous person") in his asylum application, the panel said that he disclaimed these convictions in his interview. *See Id.* at MC 2095. The panel relied on this alleged discrepancy to determine that he was not credible. *See id.* at MC 2097. In that same application, however, Mr. Sanchez also

what the nature of any such discrepancy was. Panel members often quiz detainees about past crimes and past statements during interviews without providing detainees access to their records to refresh their recollection. And because no transcript is made of interviews, it is impossible to know whether alleged discrepancies were the result of confusion on the part of the detainee or a deliberate intent to deceive the panel. With additional access to his records or opportunity to discover and present evidence concerning his criminal record, it is possible that Mr. Sanchez could have shown that there was no discrepancy and that he was telling the truth.

The panel also exaggerated the circumstances of Mr. Sanchez' convictions to support its recommendation, stating that they were for crimes of "violence, sex and drugs." *Id.* at MC 2097. In so doing, the panel failed to acknowledge that only one of his convictions was for a crime of violence (which resulted in probation), that most of the convictions resulted in probation, and that the so-called "sex crime" was for urinating in public.[29] *Id.* at MC 2096. Similarly, the panel's criticism of Mr. Sanchez for failing to work or participate in educational programming was not well-founded. The panel ignored that Mr. Sanchez was unable to work because of his health condition, and that his failure to complete an English course resulted from his release from custody before the class ended.[30] *Id.* at MC 2096-97; Brief of Appellant, 2002 WL 32298225, at *31.

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stated that he was convicted of these offenses because of his political opinion. *See Id.* at 241.

29 The panel referenced the public urination in its summary of the interview, but in the section justifying its recommendation, it described the indecent exposure convictions as "crimes of * * * sex" and referred to Mr. Sanchez as a sex offender.

30 An additional problem is the lack of availability of programming for Mariel Cubans. "While the detainee can avail himself of the various educational, vocational, and self-help programs at the

As Mr. Sanchez' experience shows, detainees with a past criminal record—and particularly detainees with a history of even petty recidivism—face an extremely heavy burden in persuading the ICE that they are "unlikely to pose a threat to the community" and "unlikely to violate their conditions of release"—especially since the regulations provide little guidance concerning the meaning of those standards. And as evidenced by this case and many others, a detainee's criminal history—which the detainee is powerless to alter—time and again becomes a justification for detention.

Angel Sanabria Casares likewise discovered how hard it was to overcome his criminal history and convince a faceless administrative officer that release is appropriate. In 1983, Mr. Casares shot a man in a drunken altercation; later pled guilty to voluntary manslaughter; and was sentenced to eight years in prison. In April 1988, Mr. Casares was released into the custody of the ICE after serving four years of his sentence. For the next seven years, he was detained by the ICE in various high security prisons. *See* Brief of Appellant at *3-*4, *Sanabria-Casares* v. *United States*, No. 95-35469 (9th Cir. Dec. 29, 1995).

In March 1993, an interview panel concluded that Mr. Casares should be released, stating that he "would be safer outside rather than inside" and had "sustained injuries while detained which have now caused him numerous medical problems." Reply Brief of Appellant at *3, *id.* The recommendation stated:

> Other than those caused by his homosexuality while detained, and his case involving murder/manslaughter, he

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facility if they exist, the majority of INS detainees are kept in county jails where no such programs are offered." *Forgotten Lifers*, *supra*, at 1113. Detainees "are repeatedly penalized for insufficient programming," even though "programming is virtually impossible" because of unavailability and frequent transfers. *Justice Project Letter*, *supra*, at 5-6.

> has no record of violence. He has shown tremendous self-development and is highly motivated, as well as being intelligent and well-spoken. He would probably do well in a halfway house. [*Id.*]

The Commissioner nevertheless denied release based on Mr. Casares' manslaughter conviction—for which he served four years in prison followed by seven years in immigration custody—and incidents while imprisoned in which Mr. Casares defended himself from attack. Brief of Appellant at *4-*5, *id.* Despite the interviewers' finding that Mr. Casares was not violent, the Commissioner concluded that Mr. Casares had "demonstrated a tendency to engage in assaultive behavior as reflected by [his] criminal record" and that "it is not clearly evident that [he was] likely to remain nonviolent and/or unlikely to pose a threat to the community." *Id.* at *5 n.4. Mr. Casares, therefore, faced an insurmountable burden in persuading the Commissioner, whom he never met, that he should be spared indefinite detention.

Mario Moreno Peña also learned first hand the difficulty of showing that detention is not warranted, particularly when access to relevant information is unavailable. Mr. Peña's parole status was revoked in May 1999 as a result of drug and robbery convictions. Order and Findings and Recommendation at 2, *Moreno-Peña* v. *INS*, No. CIV-S-99-1721-DFL (E.D. Cal. Mar. 28, 2001).

After spending nearly three years in detention pending removal, Mr. Peña was paroled in February 2002 to a halfway house for a drug treatment program.[31] Petitioner-

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[31] While Mr. Peña found a placement relatively quickly, many Mariel Cuban detainees are not as fortunate. "INS does not contract with enough such programs * * * lead[ing] to the continued detention of those approved for release until bed space becomes available." *Forgotten Lifers*, *supra*, at 1115; *see also Justice Project Letter*, *supra*, at 8-9 (noting that placement is difficult because of restrictions on placement and referring to this

Appellant's Opening Brief at 8, *Moreno-Peña* v. *INS*, No. 01-17309 (9th Cir. Oct. 19, 2002). A few months later, however, the Commissioner revoked Mr. Peña's parole due to allegations of his use of aggressive language in group therapy and alleged involvement in a fight. *Id.* Mr. Peña later learned—only through a separate information request he made to the Bureau of Prisons—that the employees of the halfway house thought he was "innocent of the charges." Excerpts of Record, Tab 9, *id.* Nevertheless, the Plan provided Mr. Peña with no opportunity to challenge the allegations that ultimately led to his parole revocation. *Id.* at 3.

Mr. Peña's case illustrates the problem of conferring unreviewable discretion over release and revocation of release decisions to an administrative official. It also illustrates the problems detainees face in gaining access to information and a complete record. In fact, many ICE district offices only release files in response to Freedom of Information Act requests, and then often take more than six months to do so. Petitioner's Brief in Support of Petition for Writ of Habeas Corpus and in Support of Motion for Release; Ex. 6, Declaration of Helen Morris, *Moreno-Peña* v. *INS*, No. CIV-S-99-1721-DFL (June 9, 2000) ("Morris Decl."); *see also id.*, Ex. 7, Declaration of D'Ann Johnson, ("Johnson Decl."). This lack of access to relevant information, especially when combined with the short notice (if any) given before interviews, makes it extremely difficult for a detainee or his representative to obtain—much less thoroughly review—the detainee's record prior to the interview. *See* Morris Decl., *supra*; Johnson Decl., *supra*.

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as "[o]ne of the most crippling hurdles" posed by the Cuban Review Plan); *Detention Reviews*, *supra*, at 611 (noting that lack of sponsorships and halfway houses is one of the "most appalling problems" of the Plan). *Human Rights Report*, *supra*, at ¶ 227 (discussing detainee held for 10 years awaiting placement after determined entitled to parole).

* * *

The Cuban Review Plan forces Mariel Cuban detainees to overcome an ill-defined and onerous burden in order to avoid indefinite detention, all without adequate access to relevant information or the assistance of counsel. Although *amici* suggest that this scheme does not comport with the Due Process Clause, this Court need not decide that difficult constitutional question and should adopt the same construction of the post-removal-period detention statute that it did in *Zadvydas*. Such a construction will prevent the arbitrary and indefinite detention of Mariel Cubans at the virtually unfettered discretion of an administrative official.

CONCLUSION

For the foregoing reasons and those set forth in the respondent's brief, this Court should affirm the judgment below.

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IN THE

Supreme Court of the United States

PHIL CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, OREGON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF STUART E. EIZENSTAT AND THOMAS W. PICKERING IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI [1]

Amici are former government officials with broad experience in policy areas implicating national security and foreign relations.

Ambassador Eizenstat was President Carter's Domestic Policy Adviser and was deeply involved in the handling of the Mariél boatlift. Under President Clinton he was Ambassador to the European Union; Deputy Treasury Secretary; Under Secretary of State for Economic, Business and Agricultural Affairs; and Under Secretary of Commerce for International Trade.

Ambassador Pickering was Under Secretary of State for Political Affairs during the Clinton Administration. He holds the personal rank of Career Ambassador, the highest in the Foreign Service. He has been Ambassador to the Russian Federation, Israel, El Salvador, and Nigeria, among other nations. During the Kennedy Administration he served in the Bureau of Intelligence and Research of the State Department.

SUMMARY

In *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), the Court declined to interpret Section 1231(a)(6) to authorize the indefinite detention of an *admitted* alien who is subject to a removal order if there is no country to which the alien can be removed. In this case, the government contends that national security, border control, and public

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party authored this brief in whole or in part and no person or entity other than amici or their counsel made a monetary contribution to its preparation or submission.

safety concerns justify interpreting Section 1231(a)(6) to authorize the indefinite detention of aliens "stopped at the border" who cannot be removed—including aliens paroled into this country who have lived here for decades—even though Section 1231(a)(6) does not distinguish between the two classes of aliens.

The government advanced similar arguments for recognizing indefinite detention authority in *Zadvydas*. The Court found those arguments wanting in that case, and they fare no better here. The interests asserted by the government do not justify interpreting Section 1231(a)(6) to authorize indefinite detention of "arriving aliens" (see 8 C.F.R. 1.1q) whose countries will not take them back.

The government asserts that it requires indefinite detention authority to protect against threats to national security that arriving aliens may pose. Congress, however, has already provided mechanisms to protect against such threats. If these mechanisms are deemed to be insufficient, Congress can augment them.

The government asserts that it requires indefinite detention authority to deter foreign countries from thrusting their unwanted citizens onto our shores, and to deter desperate citizens of foreign countries from attempting migration to this country by any and all means. The government, however, has failed to show that the risk of indefinite detention would act as such a deterrent.

The government asserts that it requires indefinite detention authority to incapacitate criminal aliens and to deter aliens from committing crimes. These goals, however, can be achieved through the criminal justice system. There is no need to vest the Executive in this area with the power to prosecute, judge, and punish.

At all events, the purposes identified by the government cannot justify interpreting Section 1231(a)(6) to authorize the indefinite detention of paroled aliens like Respondent who—far from being "stopped at the border"—were welcomed into this land with open arms as refugees from tyranny. Notwithstanding Respondent's misdeeds, the Court has recognized that such aliens stand on a different footing than those denied entry.

The government asserts that if it cannot indefinitely detain paroled aliens like Respondent, whom it wishes to, but cannot, remove, it may be forced to curtail the exercise of its parole authority. We prefer to think that a "decent, civilized, and humane" government (Gov't Br. 22) would not punish the many for the potential sins of the few, and the government does not need to take such punitive action to protect its interests.

ARGUMENT

I. THE INTERESTS ASSERTED BY THE GOVERNMENT DO NOT JUSTIFY INTERPRETING SECTION 1231(a)(6) TO AUTHORIZE THE INDEFINITE DETENTION OF ARRIVING ALIENS WHO CANNOT BE REMOVED.

A. Congress has already established mechanisms to protect against risks to national security posed by arriving aliens.

The government contends that interpreting Section 1231(a)(6) here as the Court did in *Zadvydas* would leave "a large 'unprotected spot in the Nation's armor.'" Gov't Br. 42 (citation omitted). The Court rejected that contention in *Zadvydas*. The Court should reject it here.

Congress has established extensive mechanisms to protect the nation from arriving aliens who might pose a

threat to national security.[2] Upon reaching the U.S. border, aliens traveling to the U.S. on a visa must, as part of the US-VISIT program, have both of their index fingers scanned and a digital photograph taken to verify their identity at the port of entry. See Department of Homeland Security: Travel & Transportation (last modified July 26, 2004), *available at* http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml. Aliens released into the United States who are ordered removed but cannot be are subject to constant oversight under Section 1231(a)(3), which provides for the continuous supervision and monitoring of arriving aliens who are conditionally released. Sections 1231(a)(3)(C) & (D) require an alien "to give information under oath about the alien's nationality, circumstances,

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[2] The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act.

8 C.F.R. 1.1(q).

habits, associations, and activities, and other information the Attorney General considers appropriate," and "to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien." See also 8 C.F.R. 241.13(h) (setting forth conditions of release). An alien who fails to comply with Section 1231(a)(3) may be imprisoned. 8 U.S.C. 1253(b). Thus, as the Court has recognized, "the choice * * * is not between imprisonment and the alien 'living at large,'" but "between imprisonment and supervision under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696.

Congress has authorized the Executive to detain or remove suspected terrorists in numerous other statutes. For example, Section 1226a, enacted as part of the PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), authorizes the Attorney General to certify that he "has reasonable grounds to believe" that an alien is engaged in terrorist activity or other activity threatening the national security. 8 U.S.C. 1226a(a)(3). Upon such a certification, the alien must be taken into custody and may be held without charge for up to seven days, after which the government must begin removal proceedings or bring criminal charges against the alien. 8 U.S.C. 1226a(a)(5). Subsection 1226(a)(6) specifically authorizes the continued detention of certain individuals where "removal is unlikely in the reasonably foreseeable future" and national security concerns are potentially implicated. And, under interim regulations issued in the wake of September 11, 2001, the government can detain aliens without charge for 48 hours and continue detention for an "additional reasonable period of time" under "emergency or other extraordinary circumstances." 8 C.F.R. 287.3(d).

Furthermore, 50 U.S.C. 21 authorizes the apprehension and detention of "alien enemies," meaning the citi-

zens, natives, and subjects of a foreign government with whom the United States is at war or which has perpetrated, attempted, or threatened an invasion or incursion against the United States. [3] This statute "include[s] within its ambit all aliens who by reason of ties of nativity or allegiance might be likely to favor 'the hostile nation or government' and might therefore commit acts dangerous to our public safety if allowed to remain at large." *United States ex rel. Schwarzkopf* v. *Uhl*, 137 F.2d 898, 902 (2d Cir. 1943).

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[3] 50 U.S.C. 21 provides:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

Likewise, 50 U.S.C. 23 authorizes federal courts to cause alien enemies deemed to be a "danger [to] the public peace or safety" to be apprehended and, after a full examination and hearing, to order such aliens to be removed, "and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed." See also, *e.g.*, 8 U.S.C. 1226(c)(1)(A) (authorizing custody of aliens who are inadmissible or deportable for having committed terrorist acts as defined in Section 1182(a)(2) or 1227(a)(2)); 8 U.S.C. 1537 (provisions for the removal and detention of alien terrorists).

The government disputes the adequacy of these provisions on the ground that (1) they "address security risks posed by particular individuals," but "do nothing to address security risks that are created by the policies of foreign governments," Gov't Br. 41 n.21; (2) they do nothing to protect the nation on a "day to-day basis" from "the lawlessness of ordinary criminals," *id.* at 42 n.21; and (3) "due to proof difficulties or the sensitivity of using classified information, the government may, at times, find it more expedient to exclude an individual based on his criminality or other factors than to attempt to prove his status as a terrorist," *id.*

These rationales for distinguishing between admitted and arriving aliens are unpersuasive. The government does not explain why the statutory mechanisms described above are sufficient to guard against aliens acting on their own initiative but insufficient to guard against aliens sent to the United States by foreign governments or terrorist groups to do harm. In both cases the risks are posed by individuals, and in both cases the risks posed by admitted and arriving aliens would appear to be the same. Cf. *Zadvydas*, 533 U.S. at 691 ("The provision authorizing detention does not apply narrowly to a small segment of particularly dangerous individuals,

say, suspected terrorists, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (internal quotation marks and citation omitted)).

The government similarly does not explain why its interest in preventing "the lawlessness of ordinary criminals" (see Part III, *infra*) or its need for "expediency" is different in the case of admitted and arriving aliens. The Court in *Zadvydas* rejected both of these interests as a basis for interpreting Section 1231(a)(6) to authorize indefinite detentions. The government offers no sound reason to accept them here.

The government says that it would prefer to be spared the burden of showing that any particular alien detainee is a threat to national security or public safety. But where "the only special circumstance present is the alien's removable status itself," that circumstance "bears no relation to a detainee's dangerousness." *Zadvydas*, 533 U.S. at 691-92. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *INS* v. *Chadha*, 462 U.S. 919, 944 (1983). The Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas*, 533 U.S. at 690-91.

The government asserts that the authority to detain arriving aliens indefinitely is "an essential attribute" of our sovereignty (Gov't Br. 12) and critical to "the protection of the United States' national interests" (*id.* at 41 n.21). This assertion is undermined, however, by the example of other nations that do not recognize a distinction between arriving and admitted aliens in respect of such authority. For example, in *Tan Te Lam* v. *Superintendent of Tai A Chau Detention Center*, the United Kingdom's Privy Council ordered the relief from detention of Vietnamese asylum seekers who had been detained upon arrival in Hong Kong and had been denied refugee status but who could not be repatriated to Vietnam. [1997] A.C. 97 (U.K. Privy Council). The Council affirmed principles limiting "the statutory power of detention pending removal" articulated in an earlier case that involved the detention of a deportable alien who had entered the U.K. lawfully and been given indefinite leave to stay prior to his criminal convictions. *Id.* at 111 (citing *Regina* v. *Governor of Durham Prison, Ex parte Hardial Singh* [1984] 1 W.L.R. 704). Without distinguishing between the Vietnamese asylum seekers who had not been "admitted" and the deportable alien in *Hardial Singh*, the Privy Council confirmed that "if it becomes clear that removal is not going to be possible within a reasonable time, further detention is not authorized." *Id.* The Council further stated that "the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorize administrative detention for unreasonable periods or in unreasonable circumstances." *Id.*

Similarly, in Canada, release may be ordered after 120 days regardless of the alien's status if the alien is not shown to be a national security threat or a threat to the safety of persons. *Suresh* v. *Canada*, [1998] F.C. 192. In Canada, release is required after 120 days if the individual is not shown to be a national security threat or a threat to the safety of persons. *Suresh* v. *Canada*, [1998] 4 F.C. 192. And in the Netherlands, the limit on detention of unremovable aliens is 28 days. See Netherlands Aliens Act 2000, Articles 57-59.

In short, the government has not demonstrated that national security interests justify interpreting Section 1231(a)(6) to authorize indefinite detention of removable

arriving aliens based solely on their status. If Congress should find the mechanisms that it has already established insufficient to protect national security, it may appropriately augment them. Cf. *Zadvydas*, 533 U.S. at 695 ("[W]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions * * *.").

B. Interpreting Section 1231(a)(6) as in *Zadvydas* will not precipitate a flood of refugees.

The government contends that interpreting Section 1231(a)(6) as in *Zadvydas* will encourage foreign governments to send their unwanted citizens to the United States, and then refuse to allow them back. *E.g.*, Gov't Br. 41. Although the government advanced similar concerns in *Zadvydas*, see Gov't Br. 36-37, *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), the government does not claim here that the Court's ruling in that case led to such "strategic" behavior by foreign governments.

The government has offered no basis for its assumption that the prospect of indefinite detention under the statute can deter such forced migration. If a foreign government wishes to rid itself of social undesirables by dispatching them to the United States, it is difficult to see why the fate of such individuals, once here, would be a concern.[4] The government also provides no support for its

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[4] That Cuba may have engaged in such behavior, see Gov't Br. 39-41, does not indicate that other countries will follow suit. Cuba stands on an unusual footing: It is only 90 miles from our shores; it has a government only too happy, as a matter of ideology, to disgorge social undesirables; and Congress (continued)

speculation that foreign governments will view a lack of indefinite detention authority as an invitation to infiltrate this country with terrorist operatives; and in any event, as discussed in Part I, Congress has already established mechanisms to meet this concern and may augment those mechanisms if warranted.

The government also contends that interpreting Section 1231(a)(6) as in *Zadvydas* will encourage would-be immigrants to "undertak[e] treacherous voyages to the United States in ramshackle boats * * * that are so unseaworthy as effectively to preclude the government from turning the aliens back." Gov't Br. 42. Why the United States would consider itself compelled to force these migrants to return in unseaworthy vessels is unclear. Moreover, it is far-fetched to postulate that would-be immigrants, in deciding whether to come to this country, take into account the possibility that committing crimes here could result in indefinite detention by immigration authorities. There is also no reason to suppose that individuals desperate enough to risk "life-endangering migrations," *id.*, would be deterred by the possibility of indefinite detention, especially if—as in the case of the Mariél refugees—the individuals are welcomed into the

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had enacted legislation (the Cuban Adjustment Act of 1966 and the Refugee Education Assistance Act) that provides special incentive for Cubans to attempt to migrate to the U.S. See Amicus Br. of ACLU Supporting Petitioner, *Benitez* v. *Mata*, No. 03-7434 ("ACLU Br.") 21-23, 25-30; Amicus Brief of Florida Immigrant Advocacy Center and Rafael Penalver Supporting Petitioner, *Benitez* v. *Mata*, No. 03-7434 ("FIAC Br."); Part III, *infra*. It is entirely speculative, moreover, whether President Castro would have been deterred by the prospect that the Mariél refugees would be detained indefinitely rather than paroled into the United States.

country by the President and granted parole with the intent that the parole would lead to resettlement and lawful permanent residence. Finally, most individuals who arrive on our shores but are denied asylum would continue to be removable to their countries; only in the rare case will their country not accept them back. Those cases are likely to be rare because our government has sufficient diplomatic leverage with most foreign governments to induce recalcitrants to allow their citizens to return.

C. The crime-prevention rationale rejected in *Zadvydas* should be rejected here as well.

The government contends that indefinite detention authority would serve its interest in preventing future criminal activity by arriving aliens—both by incapacitating "recidivist criminal aliens" "whom the political Branches have deemed unfit for release and who have statistically high rates of recidivism," Gov't Br. 34-35, and by giving arriving aliens "incentives for compliance" with our laws, *id.* at 36. The government argues that unless it can use the possibility of indefinite detention as "enforcement leverage," "[c]riminal aliens may quickly deduce that the availability of parole will be little affected by their misconduct." *Id.*

The key to this argument is the power that indefinite detention authority would give "the political Branches" to incapacitate and deter. But the criminal justice system is already able to incapacitate criminal aliens for the length of their criminal sentences and then to detain them for a period reasonably necessary to effectuate their removal if possible (a period that, under *Zadvydas*, can in some cases be more than six months). The government has not explained how vesting "the Political branches" with indefinite detention authority would materially achieve greater incapacitation and deterrence

than the criminal justice and immigration processes already achieve.

The Court with good reason rejected this same argument in *Zadvydas*. Like Respondent, Zadvydas was a convicted recidivist ordered removed because of his criminal history. See *Zadvydas*, 533 U.S. at 684. As here, the government argued that Zadvydas's indefinite detention was justified by the government's interest in "preventing danger to the community." *Id.* at 690 (quoting Gov't Brief in No. 99-7791, at 24). The Court rejected this position, however, stating that it has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections." *Id.* at 691. The Court held that indefinite detention is impermissible without an individualized showing of special dangerousness and that status as an unremovable alien did not render an individual particularly dangerous. *Id.* at 695-96. As *Zadvydas* illustrates, it is one thing to dispense with individualized determinations when the government proposes to detain an alien only "for the brief period necessary for his removal proceedings." *Demore* v. *Kim*, 538 U.S. 510, 517-21 (2003), but quite another thing when the government proposes to detain an alien indefinitely—potentially for the rest of his life.

Unable to argue that arriving aliens *as a class* are more likely to be "specially dangerous" than resident aliens, the government argues that the "basic purpose" of detention for removable resident aliens is "to assure the alien's presence at the moment of removal," *Zadvydas*, 533 U.S. at 699, whereas the "'basic purpose' of detaining aliens who are stopped at the border and then formally excluded * * * is exclusion itself." Gov't Br. 33. But the "exclusion purpose" rationale is not logically limited to aliens stopped at the border and formally excluded but

applies to all deportable aliens who no longer have the right to remain in the U.S. Once an alien is detained for removal, the purpose is removal, regardless of the alien's initial status.[5]

The government's assertion that the sovereignty concerns implicated here are different from those implicated in *Zadvydas* cannot be credited because the government argued that sovereignty concerns militate in favor of the indefinite detention of aliens *regardless* of the alien's class:

> The United States' interests in protecting its national sovereignty, in not allowing recalcitrance on the part of another country in accepting the return of its citizens to dictate the presence of foreign nationals at large in this country, and in protecting our society from any such foreign nationals who would pose a danger if released, are the same in the case of an alien under a final order of deportation, regardless of his prior residency here, as they are in the case of an alien who has never resided here. The

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[5] The government acknowledged the point in *Zadvydas*:

> The court of appeals in this case reasonably held that, for purposes of due process scrutiny of immigration detention, *petitioner stands on essentially the same footing as an excludable alien who has been ordered removed after seeking to enter the United States*. The alien's lack of a right to be present in the United States, and the government's countervailing interests in protecting against danger to the community and effectuating removal, *are the same in the two situations*.

Gov't Br., *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), at 35 (emphasis added).

> only act remaining to be carried out in both cases is the actual removal of the alien.

Gov't Br., *Zadvydas* v. *Underdown*, 533 U.S. 678 (2001) (No. 99-7791), at 36; *id.* at 37-38 n.17.

Under the government's reasoning in *Zadvydas*, no distinction should be drawn between arriving and admitted aliens with respect to the government's crime-prevention interests.

II. TREATING ALIENS PAROLED INTO THIS COUNTRY LIKE ALIENS "STOPPED AT THE BORDER" IS ARTIFICIAL AND UNJUSTIFIABLE.

Respondent, was not "stopped at the border" but paroled into the United States and given the prospect of permanent residence. President Carter paroled him and other Mariél refugees in 1980 as part of a government policy to foster the resettlement and lawful permanent residence of such aliens. See ACLU Br. 21-23, 25-30; FIAC Br. 16-30. From a practical standpoint, Respondent and other Mariél refugees present no greater threat to the government's asserted interests than resident aliens.

The government, however, seeks to avoid a ruling limited to long-time parolees like Respondent and to require the Court, in deciding Respondent's case, to reach the distinct questions raised by aliens stopped at the border. The government does so by warning that, if it may not subject to indefinite detainment parolees who cannot be removed, it would become less likely to parole aliens into the country in the first place. Gov't Br. 22-23. It is hard to imagine, however, that a humane government would thus punish the vast majority of harmless aliens seeking to be paroled into the United States, denying them parole because it cannot detain indefinitely the relatively

small percentage of paroled aliens whom the government might have cause to remove but who cannot be removed.[6]

Such a punitive policy seems particularly unlikely because the government would not be required to release—indeed, it would be prohibited from releasing—any parolee who could not be removed and was considered a potential threat to national security. Sec. 1226a. See also Part I, *supra*. Thus, there would be no sound reason for the government to feel constrained from exercising its parole authority in the future if the Court were to interpret Section 1231(a)(6) here as it did in *Zadvydas*.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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[6] The overwhelming majority of the 120,000 Mariél parolees are law abiding. Only a very small percentage violated the conditions of their parole and were ordered removed. Of these, approximately 750 are being subjected to indefinite imprisonment. Gov't Br. at 8.

No. 03-878

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BRIEF OF NATIONAL REFUGEE RESETTLEMENT AND ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici Curiae are organizations dedicated to the resettlement in the United States of individuals fleeing repressive regimes and inhumane conditions in their homelands. *Amici Curiae* are uniquely aware of the persecution, hardship and fear endured by refugees, and why,

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Sup. Ct. R. 37.3. Pursuant to Sup. Ct. R. 37.6, counsel for *Amici Curiae* states that no counsel for a party authorized this brief in whole or in part and no person, other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

in light of these factors, the United States in particular, and the community of nations more generally, have welcomed such people, recognized their special status under international law, and accorded them the same rights and privileges as other citizens and nationals permanently residing in the country. Included among these are the right to due process and the right to be free from arbitrary and indefinite detention.

In working with refugee communities, *Amici Curiae* also have first-hand experience with the strong ties these communities have forged with the United States and the contributions they have made to U.S. society. *Amici Curiae* have witnessed the transition of refugees into productive members of society who raise families, pay taxes, send their children to public schools, and register for the selective service. For the Mariel Cubans, twenty-five years of residence in this country have strengthened these community ties and blurred the lines of immigration nomenclature such as "parolee" or "lawful permanent resident."

Each of the *Amici* on this brief have been associated with Mariel Cubans through either direct assistance or advocacy. All of the organizations identified as *Amici* are committed to ensuring that no refugee, even those admitted as parolees, is subject to indefinite detention. The issues presented in this case are central to their efforts to ensure that victims of persecution, violence and abuse are offered a safe haven and receive just treatment in their land of refuge. The *Amici* include the following groups.

Immigration and Refugee Services of America and the U.S. Committee for Refugees is a Washington, DC-based non-profit and non-sectarian organization with an eighty-year history of service to refugees and immigrants. It works through thirty-five community-based partners to provide direct assistance to refugees and, through the U.S. Committee for Refugees, to provide public information and advocacy for refugees, asylum seekers, and displaced persons.

Episcopal Migration Ministries ("EMM") is the refugee and immigration assistance and advocacy arm of the Episcopal Church USA. EMM resettles between 2,000 and 3,000 refugees annually through twenty-six dioceses of the Episcopal Church.

The Hebrew Immigrant Aid Society ("HIAS") has assisted more than four and a half million refugees, asylum seekers, and immigrants in its 122-year history. As the oldest international migration and refugee resettlement agency in the United States, HIAS has played a significant role in the rescue and relocation of Jewish survivors of the Holocaust, as well as Jews from Morocco, Ethiopia, Egypt and the communist countries of Eastern Europe.

The Ethiopian Community Development Council Inc. ("ECDC") is one of the National Resettlement Agencies authorized by the U.S. Department of State to resettle refugees in the United States. ECDC has worked for the last twenty-eight years to support refugees and immigrants from diverse cultural backgrounds, while maintaining a focus on African newcomers.

The International Rescue Committee ("IRC"), founded in 1933, is the leading non-sectarian voluntary organization providing relief, protection and resettlement services for refugees and victims of oppression or violent conflict. The IRC is committed to ensuring freedom, human dignity and self-reliance, working in thirty-three countries overseas and more than nineteen locations in the United States.

The Southeast Asia Resource Action Center ("SEARAC") is a national advocacy organization working to advance the interests of Cambodian, Laotian, and Vietnamese Americans through leadership development, capacity building, and community empowerment. For twenty-five years, SEARAC has been an important resource and a vital voice for Southeast Asian Americans.

SUMMARY OF ARGUMENT

The United States has always proclaimed itself a generous and compassionate nation with regard to refugee protection. In 1783, George Washington described America as a "land whose 'bosom is open to receive the persecuted and oppressed of all nations.'"[2] Ronald Reagan echoed this sentiment nearly 200 years later:

> Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain; the boat people of Southeast Asia, Cuba and of Haiti; the victims of drought and famine in Africa, the Freedom Fighters in Afghanistan.[3]

In addressing the present controversy, *Amici Curiae* respectfully submit that this Court should uphold the spirit of these lofty ideals by prohibiting the indefinite detention of refugees such as the Mariel Cubans, who were openly welcomed by this nation and permanently resettled like other refugees.

This brief makes two arguments in support of Respondent. First, an examination of the history of the Mariel Cubans reveals that they were welcomed by the United States as a group of refugees fleeing Fidel Castro's communist regime, and that the United States intended they be permanently resettled. Therefore, this Court's holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), logically extends to protect all Mariel Cubans – even those who have never changed their formal immigration status to lawful permanent resident – from indefinite post-removal period detention

2. Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* xiii (1986).

3. *Text of Reagan's Speech Accepting the Republicans' Nomination*, N.Y. Times, July 18, 1980, at A8.

under 8 U.S.C. § 1231(a)(6). Over the quarter-century since their arrival, various Government policies designed to treat the Mariel Cubans as permanently resettled achieved their intended effect by allowing these refugees to cultivate and enjoy significant ties to the communities in which they made their homes. These realities of the Mariel Cubans' presence in the United States should inform the Court's interpretation of section 1231(a)(6).

Second, international law applicable to refugees contemplates that they be resettled and accorded the same rights and privileges as nationals, which include citizens and lawful permanent residents. Accordingly, under international law principles, the Government must accord the Mariel Cubans the same due process protections against indefinite post-removal period detention under 8 U.S.C. § 1231(a)(6) that were articulated by this Court for former lawful permanent residents in *Zadvydas*.

Collectively, these arguments expose the incongruity of the Government's position that the Mariel Cubans can be welcomed as refugees, resettled in accordance with U.S. and international law, and then – twenty-five years later – be denied the due process protections accorded to former lawful permanent residents by this Court in *Zadvydas*. Simply put, in light of the circumstances surrounding the Mariel Cubans' arrival and resettlement, the Government's continued hyper-technical reliance on the so-called "entry fiction" to deny constitutional protections to and indefinitely detain Mariel Cubans such as Respondent is particularly misplaced.

ARGUMENT

In *Zadvydas*, the Court concluded that 8 U.S.C. § 1231(a)(6) imposed a presumptive limit of six months on the Government's ability to detain a former lawful permanent resident who is subject to an order of removal that cannot be effectuated. The Court's opinion in *Zadvydas* recognized that post-removal period detention serves only two governmental

interests: (1) assuring that the alien will not flee and will actually leave the country if and when it becomes possible to effectuate removal; and (2) preventing the release of dangerous aliens into the community pending removal. The Court unambiguously held that the statute "does not permit indefinite detention," and affirmed that "[f]reedom from imprisonment – from government custody, detention or other forms of physical restraint – lies at the heart of the liberty" protected by the due process clause of the Constitution. 533 U.S. at 689-90.

On its face, section 1231(a)(6) makes no distinction between former lawful permanent residents, such as Zadvydas, and other aliens, such as Respondent Suarez-Martinez, a refugee brought into the United States as a parolee for humanitarian reasons pursuant to 8 U.S.C. § 1182(d)(5). As others have argued, that lack of a statutory distinction requires that *Zadvydas* controls here.[4]

Indeed, in a recent opinion involving an enemy national captured abroad in connection with hostilities in Afghanistan and incarcerated at Guantanamo Bay, Cuba, the Court noted that 28 U.S.C. § 2241 – another protection against arbitrary and unreasonable government detentions – makes no distinction on its face between United States citizens and others. Nor is there any clearly-expressed congressional intent to make such a distinction. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004). The Court held that it could not draw a distinction between U.S. citizens and non-citizens in the application of the statute, and therefore permitted judicial review of the detention of an alien as an enemy combatant. In the absence of any statutory distinction in section 1231(a)(6) between a former lawful permanent resident and a refugee brought into the United States pursuant to the

4. *See, e.g.*, Brief for Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004); Brief for the American Civil Liberties Union as *Amicus Curiae* Supporting Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004).

Government's parole authority nearly a quarter-century ago, the Court should similarly conclude that the presumption of a maximum period of six months applies equally to post-removal period detention of the latter.

Despite the absence of a statutory distinction based on immigration status in section 1231(a)(6), the Government attempts to read one into the statute by arguing that, because the Mariel Cubans were paroled into the United States upon arrival for reasons of administrative convenience, their due process rights fall victim to the paradoxical so-called "entry fiction." Under the "entry fiction," Respondent – despite having lived in the United States for the past twenty-five years – is deemed not to have "entered" the United States and can be treated as a noncitizen perpetually seeking admission at the border, simply because he was admitted as a parolee pursuant to 8 U.S.C. § 1182(d)(5)(A). Under this "entry fiction," individuals like Respondent, who have been physically and lawfully within the country's territorial boundaries for almost a quarter-century, are not considered to be present within the United States. *See* Brief for the Respondents at 34-40, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791). The Government argues that this hyper-technical classification deprives Respondent of the Fifth Amendment due process protections otherwise available to "all 'persons' within the United States." *Zadvydas*, 533 U.S. at 693 (noting that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent") (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98, 596 n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and *Shaughnesssy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

If the Court were to accept the Government's argument and conclude that inquiry beyond the plain language of

section 1231(a)(6) is necessary to discern whether the *Zadvydas* "reasonable time" restriction on detentions applies, *Amici Curiae* posit that the Court's analysis of the relevant statutory and constitutional issues should be informed by the special status of refugees like the Mariel Cubans under U.S. and international law. Given the history of the Mariel Cubans and their treatment in the United States, application of the "entry fiction" here would be anomalous. It makes no sense to provide greater due process protections to foreign nationals who are alleged to have taken up arms against the United States than to refugees whom the nation welcomed with open arms and treated as permanently resettled residents for a quarter century.

Accordingly, the first section of this argument details the history of the Mariel Cubans and discusses analogous instances in history where the United States used the parole power to extend similar welcoming treatment to groups fleeing repressive regimes en masse.[5] From the moment of their eviction from Cuba, to President Carter's welcoming them to the United States, to their resettlement here over the past quarter century, the Mariel Cubans have been treated as refugees intended for resettlement and integration into this country. This treatment should entitle them to the same rights as the Court mandated for former lawful permanent residents in *Zadvydas*.

The second section notes the special treatment and status afforded refugees under treaties adopted by the United States that contemplate that refugees such as the Mariel Cubans be resettled with all the rights and privileges of nationals – including the right to be free from indefinite detention. In short, in light of the historical background of the Mariel Cubans and the special protections afforded to refugees under international law, the Government's efforts to exclude refugee-parolees from the protections the Court recognized in *Zadvydas* should be rejected.

5. For this reason, this brief occasionally refers to Mariel Cubans as "refugee-parolees."

I. The United States Welcomed The Mariel Cubans As Refugees With The Intent Of Permanent Resettlement

A. The Mariel Cubans Fled Cuba As Refugees

In the spring of 1980, in a desperate attempt to flee Cuban dictator Fidel Castro's oppressive regime, six Cubans crashed a bus through the gate and onto the grounds of the Peruvian embassy in Havana.[6] Castro demanded that the asylum-seekers be returned, but the Peruvian Government refused. In a quixotic but failed effort to demonstrate that, given the chance, no Cuban citizen would actually choose to leave, the Cuban leader announced by radio that anyone wishing to leave Cuba should go to the Peruvian embassy.[7] Three days later, the Peruvian embassy held 10,000 Cubans.[8] The situation quickly degenerated into a humanitarian crisis as the absence of food and water reduced the stranded Cubans to eating tree leaves.[9]

A group of Cuban exiles in Miami organized a "freedom flotilla" – forty-two boats loaded with food and medicine dispatched to Havana intended to relieve the Cubans still stranded in the Peruvian embassy.[10] In an attempt to preserve lives in the face of a dangerous sea crossing, the Carter Administration persuaded Castro to permit refugees to leave via a U.S. Government-controlled airlift for processing in Costa Rica. However, after the United States had flown out only 700 refugees from the embassy,[11] Castro called off the

6. Félix R. Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 78 (1988).

7. *Id.* at 79.

8. *Id.*

9. Lydia Martin, *Arturo Fuerte*, Miami Herald, May 23, 1999, at 2I.

10. Masud-Piloto, *supra* note 6, at 83.

11. Mario A. Rivera, *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis* 6 (1991).

airlift and opened the port of Mariel to any and all Cuban-Americans seeking to bring relatives back with them to the United States.[12]

Thousands of exiled Cuban-Americans, many of whom had paid hundreds, sometimes thousands of dollars for the trip, arrived in Mariel harbor only to find that not only would they return to the United States with their relatives, but that they would be forced to take strangers as well. Castro required each boat to carry back four additional Cubans for each relative who boarded.[13] One Cuban-American woman reported that "[e]ven the people who got relatives, they did not get all their families."[14] Because the Cuban Government denied the boat captains control over the number or identities of people boarding for the return trip, some of the boats returned empty, while others were dangerously overloaded with Cubans desperate to flee the Castro regime.[15] Those who left risked everything by doing so. At least twenty-six people died in the crossing. Nevertheless, more than 125,000 Cubans fled to U.S. shores before Castro closed the port of Mariel.[16]

To accommodate the high number of refugees and the rapid rate of their arrival,[17] the Federal Government set up

12. Masud-Piloto, *supra* note 6, at 83.

13. Ward Sinclair & Joanne Omang, *U.S. Cracks Down on Refugee Boats*, Wash. Post, Apr. 26, 1980, at A22.

14. Ed Bruske, *The Perilous Journey; Cubans Sail with Hope, Return with Empty Arms*, Wash. Post, May 22, 1980, (Md. Weekly), at Md. 1.

15. *See id.*; Karen DeYoung, *American Boaters Caught in Bind Between U.S., Cuban Authorities*, Wash. Post, May 20, 1980, at A1.

16. Jonathan King & Luisa Yanez, *Season of Chaos*, Sun-Sentinel (Fort Lauderdale, Fla.), May 7, 2000, at 1G.

17. More than 16,000 refugees arrived in the United States during one six-day period alone – compelling evidence of their (Cont'd)

temporary housing and processing centers, most of which were located in Florida, but some of which were established in Wisconsin, Pennsylvania, and Arkansas.[18] Thousands of new arrivals camped out that summer in makeshift housing in the Orange Bowl stadium in Miami and in a number of different U.S. military bases, and were fed and clothed by a massive influx of donations from surrounding communities.[19] The situation was so dire that the Carter Administration declared a state of emergency in south Florida, delegating coordination to the Federal Emergency Management Agency.[20]

B. The Parole Authority Was Used To Admit Mariel Cubans Into The United States To Swiftly Address A Growing Humanitarian Crisis While Circumventing Existing Constraints On Admitting Large Groups of Refugees

In the spring and summer of 1980, the Carter Administration's policy regarding the thousands of fleeing Cubans was to welcome them with "open heart and open arms."[21] This welcoming attitude was fully consistent with the treatment of refugees in prior years in comparable humanitarian crises. President Eisenhower stated in 1961,

(Cont'd)
tremendous desire to leave Cuba and come to the United States. E.A. Torriero & Luisa Yanez, *From Mariel to Miami; Cuban Refugees Changed the Face of South Florida*, Sun-Sentinel (Fort Lauderdale, Fla.), May 21, 1995, at 1A.

18. Mark S. Hamm, *The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People* 54 (1995).

19. Dennis A. Williams et al., *The Cuban Tide Is a Flood*, Newsweek, May 19, 1980, at 28.

20. David W. Engstrom, *Presidential Decision Making Adrift* 141 (1997)

21. David M. Alpern et al., *Carter and the Cuban Influx*, Newsweek, May 26, 1980, at 22.

"[o]ur people opened their homes and hearts to the Hungarian refugees four years ago. I am sure we will do no less for the distressed Cubans."[22] President Kennedy had likewise labeled America "a lantern in the dark for those who love freedom but are persecuted, in misery, or in need."[23] While the factual circumstances in 1980 were similar, the political landscape was somewhat different.

The overwhelming number of Cubans arriving in the United States in the spring and summer of 1980 followed fast on the heels of a recent mass influx of Haitian immigrants. Thus, while the Mariel Cubans had been openly encouraged to come, their arrival found the United States somewhat administratively unprepared. For example, the then newly-enacted Refugee Act of 1980 ("1980 Act")[24] envisioned that, before coming to the United States, refugees would land in a country of first asylum for processing by U.S. officials, and thus the practice of paroling refugees en masse would shift to a limited case-by-case basis. As the Carter Administration recognized that the United States had to immediately provide permanent refuge to the large numbers of refugees fleeing the oppressive communist Castro regime, it realized that the parole authority was the only legal mechanism through which to accomplish this goal.

Faced with these concerns, the Carter Administration issued a policy statement granting parole as "Cuban/Haitian Entrants (status pending)" to Cubans arriving between April 21, 1980 and June 19, 1980, as well as to Haitians in INS proceedings pending as of June 19, 1980.[25] The Mariel

22. Masud-Piloto, *supra* note 6, at 32.

23. *Id.* at 44.

24. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified as amended in scattered sections of 8 U.S.C.).

25. *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8. Importantly, the Carter Administration's (Cont'd)

Cubans were not formally classified as "refugees" because, as set forth above, that label would have potentially placed the Carter Administration at odds with the case by case screening requirements of the 1980 Act.[26] The Administration announced that it would submit legislation to Congress "as soon as possible" to "[e]stablish a 'Cuban-Haitian Entrant' status for recently arrived Cubans and Haitians"; provide federal benefits and emergency assistance to the entrants; and "[p]rovide for conversion to permanent resident alien status after two years."[27] In October 1980, the Cuban/Haitian Entrant classification was extended to Cubans and Haitians arriving between June 20 and October 10, 1980, thus encompassing all Cubans who arrived as part of the Mariel boatlift.[28] These policies reflected the Government's position that "[t]hese people for the most part are here to stay,"[29] while skirting political and legal issues that might have otherwise arisen under the 1980 Act.

Thus, the Government used its parole power as a method of circumventing existing constraints on bringing large groups of refugees into the country while swiftly addressing a humanitarian crisis. *See* Brief of *Amicus Curiae* Florida Immigrant Advocacy Center and Rafael Peñalver in Support of Petitioner at 24-27, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 23, 2004). Accordingly, even though they were not technically admitted as refugees, Mariel Cuban parolees were,

(Cont'd)
decision to label the Mariel Cubans as "entrants" undercuts the "entry fiction" relied on by the government in this case to avoid extending the protections of *Zadvydas* to Respondent.

26. Engstrom, *supra* note 20, at 139.

27. *Text of State Dept. Statement on a Refugee Policy*, *supra* note 25.

28. Rivera, *supra* note 11, at 15.

29. Robert Pear, *U.S. to Let Refugees from Cuba and Haiti Remain for 6 Months*, N.Y. Times, June 21, 1980, at 1.

for all practical purposes, refugees intended for permanent resettlement in the United States. To persist in applying the "entry fiction" to deny Mariel Cuban parolees due process rights with respect to their indefinite detention is thus both intolerable and unnecessary.

C. The Government Historically Has Used The Parole Power To Resettle Large Refugee Groups

This Court's interpretation of section 1231(a)(6) should recognize that the statute's application goes beyond the facts applicable to Respondent and extends to other refugees admitted under the parole power as well. In fact, the parole power has often been used by the Government to permanently resettle refugees while skirting formal immigration quotas.

In 1956, in the wake of the Soviet puppet regime's crackdown on efforts at democratic reform in Hungary, approximately 200,000 Hungarians fled their homeland.[30] U.S. immigration quotas at the time were inadequate to admit such a large number.[31] Refusing to turn the nation's back on a group of refugees, President Eisenhower announced his decision to admit 21,200 Hungarians, 15,000 of whom were paroled.[32] As with the Mariel Cubans, parole was used as a tool to permanently resettle the Hungarian refugees: Congress later passed legislation granting them lawful permanent resident status.[33]

In 1975, the collapse of the South Vietnamese Government, coupled with Pol Pot's rise to power and instigation of genocide and torture against the Cambodian people, caused the exodus of hundreds of thousands of

30. Loescher & Scanlan, *supra* note 2, at 50.

31. *Id.* at 55. Hungarian quotas had been mortgaged to exceed the numbers allowable for several years. *Id.*

32. Loescher & Scanlan, *supra* note 2, at 55.

33. Act of July 25, 1958, Pub. L. No. 85-559, § 2, 72 Stat. 419, 419-20.

refugees from Southeast Asia,[34] a large proportion of whom eventually reached American shores.[35] As in the late 1950s, U.S. immigration quotas were absurdly low when compared to the number of individuals seeking admission. In ten separate actions, each one paroling in thousands of Indochinese and each one followed by a build-up of newly-arrived refugees, the Ford and Carter Administrations paroled over 300,000 Indochinese refugees between 1975 and 1979.[36] The Indochinese were later given the right to adjust their status to that of lawful permanent resident.[37]

The history of Cuban immigration into the United States demonstrates a similar use of the parole power. Between 1959 and 1961, 125,000 Cubans fled to the United States to escape Castro's new communist dictatorship. The Kennedy Administration used the parole authority to admit hundreds of thousands of these refugees.[38] In time, the admission of Cubans under the parole authority in excess of the established quota limits[39] became an accepted aspect of U.S. refugee policy.[40]

34. Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. Int'l L. & Com. Reg. 559 601 (2001) (reviewing Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998)).

35. Loescher and Scanlan, *supra* note 2, at 121.

36. Gee, *supra* note 34, at 603.

37. Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223.

38. Loescher & Scanlan, *supra* note 2, at 68. Almost 250,000 Cubans arrived in America between 1959 and 1962. *Id.* at 70.

39. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). The McCarran-Walter Act amended immigration quotas to promote the admission of persons with needed skills.

40. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 16 (1981).

In fact, between 1962 and April 1979, the parole power was used to admit close to 700,000 Cubans.[41]

Beginning in 1961, Cubans received an additional benefit: Cuban-Americans could apply, on behalf of their relatives still in Cuba, for waivers of the requirement to obtain visas in order to enter the United States.[42] These individuals were then paroled into the country.[43] A 1967 INS publication noted that these parolees were "refugees . . . coming to stay indefinitely, many intending to work."[44] Under the Cuban Refugee Adjustment Act of 1966 ("1966 Act"),[45] Cubans admitted under parole status could apply for permanent residency status after living in the United States for only two years.

These historical examples establish that the parole power has been commonly used by the Government to facilitate the permanent resettlement of large refugee groups. As a result, under the Government's argument, numerous refugees are potentially subject to a summary denial of the due process protections outlined by the Court in *Zadvydas* by virtue of the administrative mechanism by which they were admitted to this country. Such a result, and on such a large scale, is simply inconsistent with the Government's historical intent that the parole of refugees be used as a tool to assist their permanent resettlement in the United States. Accordingly, the Court should eschew application of the "entry fiction" to deny fundamental rights to refugees who have in fact been treated as "entrants" and permanently resettled.

41. Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865, 871 (1982).

42. Robert L. Woytych, *The Cuban Refugee*, I & N Rep., Oct. 1967, at 15, 15.

43. *Id.* at 16.

44. *Id.*

45. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

D. The United States Intended That The Mariel Cubans Be Permanently Resettled

Recognizing that "it is time Cuban/Haitian Entrants are granted a status that is consistent with the reality of their permanent residency in the United States,"[46] Congress embarked on a number of different legislative initiatives designed to conform the law to the fact of the Mariel Cubans' permanent resettlement. With the 1980 Act, Congress amended the 1966 Act, making Cuban parolees eligible for lawful permanent resident status after only one year continuous residence in the United States.[47] Further, like refugees, there is no limit to the number of Cuban parolees that can adjust to lawful permanent residency each year. It is also significant to note that, unlike other legislation that provides for the adjustment of status of other populations, only the 1966 Act, enacted specifically for Cubans, provides no cut-off date for applicants. The United States wanted to ensure that Cubans had legal avenues to remain in the United States permanently whether they were paroled, inspected, or admitted. Moreover, Congress ensured that the Mariel Cubans in particular had the right to apply for lawful permanent resident status with the passage of the Immigration Reform and Control Act of 1986 ("1986 Act"), which explicitly allowed Cuban/Haitian Entrants (status pending) the ability to apply for the same adjustment.[48]

Indeed, the Mariel Cubans, like all refugee-parolees, also benefited from policies designed to facilitate their ability to

46. H.R. Rep. No. 99-682(I), at 76 (1986).

47. Refugee Act of 1980, Pub. L. No. 96-212, § 209, 94 Stat. 102, 105-06. The Cuban Adjustment Act of 1966 had imposed a requirement of two years continuous residence. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

48. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404-05. *See also* Brief of Amicus Curiae Florida Immigrant Advocacy Center and Rafael Peñalver in Support of Petitioner at 29-30, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 23, 2004).

adjust status under the 1966 and 1986 Acts. In fact, refugee-parolee populations are commonly exempt from certain grounds of inadmissibility that apply to immigrants, including sections 212(a)(4)-(6) of the Immigration and Nationality Act, which exclude immigrants from adjustment on the basis of, among other things, economics, documentation, and manner of entry.[49] In addition, Cubans are not required to apply for political asylum or prove their refugee status.[50] These exemptions represent legal recognition of the unique circumstances that brought Cubans to our shores and our intent for them to remain permanently in the United States.

Outside of legislation allowing the Mariel Cubans to change their formal immigration status, the U.S. Government provided other benefits designed to assist in the permanent resettlement of the Mariel Cubans in the United States. Since the passage of the Migration and Refugee Assistance Act of 1962, Cubans have received funds to assist in their permanent integration into American society.[51] In September 1980, the Carter administration made its first major funds appropriation to assist the Mariel Cubans in particular when it set aside over $31 million from the U.S. Emergency Refugee and Migration Assistance Fund "for the purposes of processing, transport[ing], caring [for], and resettling" Cuban and Haitian refugees.[52] Likewise, Cuban/Haitian Entrants have been provided Supplemental Security Income ("SSI"), Medicaid, Aid to Families with Dependent Children ("AFDC"), and other federal benefits.

49. Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

50. Note, *The Cuban Adjustment Act of 1966: Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 Harv. L. Rev. 902, 906 (2001).

51. Pub L. No. 87-510, 76 Stat. 121; *see, e.g.*, Presidential Determination No. 95-13, 60 Fed. Reg. 2675, (Dec. 31, 1994).

52. Presidential Determination No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980).

With the passage of the Refugee Education Assistance Act of 1980, Congress not only provided educational benefits for a great number of Cuban refugee children, but also authorized benefits under other refugee assistance statutes to apply "in the same manner and to the same extent with respect to Cuban and Haitian entrants."[53] The Office of Refugee Resettlement, created in 1980, provides cash, medical benefits, social services, preventative health care, and services for young refugees – all programs that have benefited the Mariel Cubans.[54] The Office also offers cash grants to help communities with resettlement problems.[55] This aid is available to those that fall under INS definition of "refugee" as well as to "Cuban/Haitian entrants."[56]

Mariel Cubans have also benefited from lower eligibility requirements for certain federal benefit programs. In fact, the 1986 Act imposed different restrictions on the eligibility for federally funded public assistance programs of aliens in the statuses it created – temporary resident, special agricultural worker, and replenishment agricultural worker. Members of each category are restricted from becoming eligible for certain programs for five years after the initiation of those statuses. The five-year restrictions apply even if they become lawful permanent residents during that period.[57] Most temporary resident aliens are subject to this rule for

53. Pub. L. No. 96-422, § 501(b), 94 Stat. 1799, 1809.

54. *See* Office of Refugee Resettlement, U.S. Dep't of Health and Human Services, *Factsheet: Office of Refugee Resettlement Administration for Children and Families, at* http://www.acf.dhhs.gov/programs/orr/ mission/factsheet.htm (last updated Feb. 5, 2002).

55. *Id.*

56. Office of Refugee Resettlement, U.S. Dep't of Health and Human Services, *Eligibility Guidelines for Refugee Assistance and Services Through the Office of Refugee Resettlement, at* http://www.acf.dhhs.gov/programs/orr/geninfo/index.htm (last updated Nov. 10, 2003).

57. 8 U.S.C. §§ 1160(f), 1255a(h).

AFDC, some medical assistance, and food stamps, as well as for additional financial assistance programs that the Attorney General designates.[58] Only temporary residents who fall into the category of Cuban/Haitian entrants are completely exempt.[59]

These policies have had their intended effect to integrate Mariel Cubans as permanently resettled. In South Florida, for example, Mariel Cubans are successful fashion designers and owners of restaurant chains and multimillion dollar businesses.[60] Many of those who are involved in the arts are making a significant mark in American culture after being censored in Cuba from displaying their talents.[61] Their numbers are so large that they have been dubbed "The Mariel Generation."[62]

Zadvydas holds that the Government cannot indefinitely detain under 8 U.S.C. § 1231(a)(6) a former lawful permanent resident who is subject to an order of removal. As outlined above, the Mariel Cubans are beneficiaries of legislation specifically designed to assist in their permanent resettlement. These laws have helped the Mariel Cubans as a group successfully integrate into U.S. society and establish family, community, and economic ties, directly cutting against the Government's hyper-technical reliance on a legal fiction that insists they have never entered the country. That some Mariel Cubans have committed crimes that rendered them subsequently removable does not make them any different from the lawful permanent residents in *Zadvydas* who also committed crimes. The fact that they are criminals renders

58. 8 U.S.C. § 1255a(h)(1).

59. 8 U.S.C. § 1255a(h)(2)(A).

60. Elaine De Valle & Fabiola Santiago, *The Legacy of Mariel Miami Experience Fueled Success*, Miami Herald, Apr. 18, 2000, at 1A.

61. Fabiola Santiago, *Mariel Cubans Continue to Cross into the World of High Art, Culture*, Miami Herald, May 7, 2000, at 1M.

62. De Valle & Santiago, *supra* note 60.

them removable but does not deprive them of due process, especially with respect to their right to be free from indefinite detention.

The Government's use of the parole power to admit the Mariel Cubans reflected merely the absence of any other legal instrument to respond to an immediate and overwhelming humanitarian crisis. Use of the parole power did not, however, reflect any intent to permanently condemn the Mariel Cubans to the vagaries of the "entry fiction." *Amici Curiae* respectfully submit that, in interpreting section 1231(a)(6), the Court should take notice of these realities of the Mariel Cubans' existence and the Government's facilitating stance towards the Mariel Cubans as a whole.

II. Refugees Occupy A Special Status In International Law That Should Inform The Court's Construction Of 8 U.S.C. § 1231(a)(6)

As shown above, despite the particular nomenclature given to them by the U.S. Government upon their arrival, the Mariel Cubans were refugees and were brought into this country with the intent that they be permanently resettled. As refugees, the Mariel Cubans are entitled to due process rights and other benefits under international law, including the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"),[63] to which the United States is bound. These international principles outline standards for refugee treatment that contemplate that refugees be permanently resettled and accorded the same treatment provided to nationals. In short, international law prohibits interpreting section 1231(a)(6) in such a way as to deny due process rights to refugees like the Mariel Cubans.

63. *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

A. This Court May Properly Look At International Law In Interpreting Section 1231(a)(6)

Amici Curiae respectfully submit that the Court should also look to the special status refugees occupy under international law in determining whether the Mariel Cubans are free from indefinite detention under section 1231(a)(6). For two centuries, the Court has recognized that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Since then, this canon of construction has become an important component of the legal regime defining the relationship between U.S. and international law. It is applied regularly by this Court and lower federal courts, and it is reflected in the Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). It is therefore appropriate that this Court's interpretation of 8 U.S.C. § 1231(a)(6) conform to international refugee law.

To the extent section 1231(a)(6) is ambiguous, the Court should consider customary international law as outlined in this brief and by other *amici*.[64] This Court announced as long ago as 1900, in *The Paquete Habana*,[65] that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are

64. *See* Brief for the American Civil Liberties Union as *Amicus Curiae* Supporting Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004); Brief for the Lawyers Committee for Human Rights, Human Rights Watch, and Amnesty International USA as *Amici Curiae* in Support of Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004).

65. 175 U.S. 677 (1900).

duly presented for their determination."[66] Customary international law is therefore directly applicable to domestic adjudication by federal courts:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these to the works of jurists and commentators. . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trust in or evidence of what the law really is.[67]

More recently, in *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit, having examined the Universal Declaration of Human Rights and other international instruments, followed *The Paquete Habana* in determining, under evolving principles of customary international law, that torture is a violation of human rights.[68]

B. The 1951 Convention And The 1967 Protocol Provide The International Framework For The Treatment Of Refugees

In the aftermath of atrocities committed by Nazi Germany during World War II, an international consensus developed that refugee issues were critical to the safety of nations and the preservation of human rights. The number of displaced persons at the conclusion of World War II totaled nearly 14 million.[69]

66. *Id.* at 700.

67. *Id.*

68. 630 F.2d 876 (2d Cir. 1980).

69. The Soviet Union claimed that it took charge of over 7.2 million forced laborers and prisoners of war. The French cared for more than 1.6 million Polish nationals, 700,000 Italians, 350,000 Czechoslovakians, 300,000 Belgians, and over 300,000 Dutch. Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* 3 at 299 (1985).

The United States admitted approximately 350,000 individuals who had been displaced as a result of that war.[70]

By 1950, the newly-formed United Nations[71] had initiated measures designed to define international refugee law. The first priority of the U.N. General Assembly was to establish an office that would effectively oversee international refugee issues, the United Nations High Commissioner for Refugees ("UNHCR").[72]

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70. Loescher & Scanlan, *supra* note 2, at 2.

71. On October 24, 1945, the United States accepted the Charter of the United Nations. With that acceptance, the United States agreed to promote "universal respect for, and observance of, human rights and fundamental freedoms for all." U.N. Charter art. 55. The United States further pledged to "reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person." U.N. Charter pmbl.

72. The responsibilities of the High Commissioner include:

> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
>
> (b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
>
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
>
> (d) Promoting admission of refugees, not excluding those in the most destitute categories, to the territories of States;
>
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(Cont'd)

A subsequent international conference produced the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention").[73] The drafters of the 1951 Convention sought "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms . . . and to extend the scope of and the protection accorded."[74] Under the 1951 Convention, the burden for an individual applying for political asylum to prove his or her status as a refugee is lower than that under the previous U.S. standard.[75] Instead of establishing a "clear probability" of persecution, under Article 1 of the 1951 Convention an applicant need only show that he or she has a "well-founded fear" of persecution.[76]

The United States and other non-European nations did not sign the 1951 Convention. The United States, however, later acceded to 1967 Protocol, which incorporated Articles 2 through 34 of the 1951 Convention without change.[77] By signing the

---

(Cont'd)

> (f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
>
> (g) Keeping in close touch with the governments and inter-governmental organizations concerned;
>
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; and
>
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 47, U.N. Doc. A/1775 (1950).

73. July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention]. The Convention became effective on April 22, 1954.

74. *Id.* pmbl., 189 U.N.T.S. at 150.

75. *Id.* art. 1, 189 U.N.T.S. at 152-56.

76. *Id.* at 154.

77. 1967 Protocol, *supra* note 63, art. 1(1), 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

1967 Protocol without reservations, the United States bound itself to the articles and precepts of the 1951 Convention.[78]

The 1951 Convention provided a foundation for the substantive provisions of the 1980 Act.[79] On March 17, 1980, Congress enacted the 1980 Act, acknowledging during the accompanying debates its intent to conform to the standards of the 1951 Convention and the Protocol.[80] The 1980 Act declared that it was "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[81] Congressman Rodino, in voicing his support for the legislation, described the 1980 Act as:

> [O]ne of the most important pieces of humanitarian legislation ever enacted by a United States Congress. . . . By [its] deep dedication and untiring efforts, the United States has once again . . . demonstrated its concern for the homeless, the

78. *See Mosquera-Perez v. INS*, 3 F.3d 553, 556-57 (1st Cir. 1993) (explaining that the Refugee Act of 1980 attempted to comply with the 1967 Protocol by incorporating Articles 2 through 34 of the 1951 Convention); *see also* United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 9, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) (concluding that accession to the 1967 Protocol binds signatories to the 1951 Convention's principles); 142 Cong. Rec. S11,905 (daily ed. Sept. 30, 1996) (letter from Anne Willem Bijleveld, Rep., UNHCR, to Hon. Orrin Hatch, Chairman, S. Judiciary Comm.) (noting the United States' obligations to the 1951 Convention's principles through the 1967 Protocol's incorporation of the 1951 Convention).

79. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

80. 126 Cong. Rec. 3757 (1980) ("The new definition makes our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees"); *see also* H.R. Conf. Rep. No. 96-781, at 19 (1980).

81. Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102.

> defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.[82]

Thus, the Government made a conscious policy determination to adopt the international refugee regime by ratifying the 1967 Protocol and enacting the 1980 Act. These are clear statements of U.S. domestic and foreign policy, and the Court's evaluation of the scope of *Zadvydas's* reading of section 1231(a)(6) should be informed by that same international refugee regime.

C. The 1951 Convention Mandates That Refugees Be Treated On An Equal Footing With Nationals

The 1951 Convention sets forth a number of protections afforded to refugees. At the core of these protections is the principle that refugees' rights of access to the courts should be no less than those given to nationals, which includes citizens and noncitizen residents that have applied for citizenship.[83] *See* Article 16 of the 1951 Convention (providing that refugees shall have the right to "the same treatment as a national in matters pertaining to access to the Courts, including legal assistance").[84]

82. 126 Cong. Rec. 1519, 1522 (1980).

83. The 1951 Convention endorses the sovereign's interpretation of what constitutes a "national." 1951 Convention, *supra* note 73, art. 1(E), 189 U.N.T.S. at 156 ("This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."). United States law defines a "national of the United States" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). To qualify as a national, a noncitizen resident of the United States must have applied for citizenship. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001); *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 638 (8th Cir. 1976).

84. 1951 Convention, *supra* note 73, art. 16., 189 U.N.T.S. at 164.

Article 16 has powerful implications for this case: its mandate that refugees be treated like nationals regarding access to courts and other fundamental rights prohibits the line-drawing the Government seeks to read into section 1231(a)(6). Indeed, Article 16 sets the baseline of due process rights for refugees at that given to nationals. Treating refugees differently from other nationals is the very result Article 16 prohibits.

Article 16 of the 1951 Convention establishes that a refugee-parolee, such as Respondent here, has a protectable interest against arbitrary and indefinite detention that is distinct from his or her initial admission or application for admission. Likewise, U.S. courts have long recognized that an alien's interest in admission is separate from his or her interest to be free from indefinite detention, the latter of which is protected by the due process clause. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) ("Therefore, an alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the Miranda warning."), *overruled on other grounds by United States v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988). To continue a refugee-parolee's confinement under section 1231(a)(6) beyond the six months presumptive limit established by this Court in *Zadvydas* is therefore both unreasonable and unjust. In light of the fact that there is no basis under the 1951 Convention for drawing

distinctions between refugees and permanent residents, it is inconsistent with *Zadvydas* to interpret section 1231(a)(6) in a manner that diminishes due process rights.

The broad procedural protections under Article 16, moreover, represent only part of the special rights granted refugees under the 1951 Convention. Refugees also have: the right to non-discrimination as to race, religion or country of origin; the right to continuity of residence; movable and immovable property rights; artistic and intellectual property rights; rights of association; equal opportunity employment rights; the right to self-employment; the right to practice liberal professions; fair and non-discriminatory housing rights; the right to public education; the right to public relief and assistance on the same terms and conditions as nationals; the right to the benefit of labor and social security legislation on the same terms and conditions as nationals; the right to administrative assistance from the Government in obtaining documents and certifications; the right to have identity papers issued in the absence of a valid travel document; the right to travel documents for the purpose of traveling outside the issuing nation; the right not to have to pay fiscal charges and taxes higher than those imposed on nationals; the right to transfer assets; and the right to naturalization and assimilation.[85] These essential rights confer on refugees the very protections and privileges that allow them to integrate into and develop ties with their new communities.

Collectively, the due process protections of Article 16 and the extensive bundle of rights outlined above evidences the intent of international refugee law to ensure that refugees be treated as a permanent part of the community. The Government's reliance on the "entry fiction," runs counter to this intent and creates an unwarranted distinction under section 1231(a)(6) between certain refugees like the Mariel

85. 1951 Convention, *supra* note 73, arts. 3, 10, 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30, and 34, 189 U.N.T.S. at 156, 160-76.

Cubans, on the one hand, and, on the other, those aliens who it deems to have effected an "entry" simply because they did not enter under the Government's parole power. Thus, insofar as the Government's distinction between refugee-parolees and residents relies on this "entry fiction," visiting students, temporary workers, and others who have effected an "entry" other than under the Government's parole power (including those who crossed the border illegally), would be entitled to far greater rights than the Mariel Cubans. Indeed, the Government recognizes that *Zadvydas* applies to all those groups, but not to Mariel Cubans. *See* 8 C.F.R. § 241.13 (regulation issued by the Department of Homeland Security soon after *Zadvydas*, allowing for special review and release of certain aliens who can show that it is unlikely they will be removed from the country in the reasonably foreseeable future. The regulation, however, has a limited application and specifically does not include Mariel Cuban parolees.). Given the background of the Mariel Cubans' arrival and subsequent treatment as refugees permanently resettled here, the Court should eschew any construction of section 1231(a)(6) that would have the absurd result of conferring greater rights on aliens who enter the United States on a temporary basis than on refugees who were permanently resettled.

CONCLUSION

Amici Curiae respectfully request that the Court affirm the holding of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Representatives of a diverse array of religious organizations in the United States unite here as *amici curiae* on behalf of Respondent Sergio Suarez Martinez. Notwithstanding any differences in opinion they may have regarding the circumstances, if any, under which indefinite detention may be imposed, ***all*** of these *amici* oppose the indefinite detention, based solely on an unreviewable administrative release determination, of a person who was legally paroled into the United States twenty-four years ago, has been and continues to be living in the United States, is subject to a removal order, yet has no legitimate expectation of removal within the reasonably foreseeable future. In the view of *amici*, indefinite detention under these circumstance offends fundamental moral and ethical principles shared by religious organizations throughout the world.

Individual statements of interest are provided in the Appendix to this Brief.

SUMMARY OF THE ARGUMENT

The religious organizations joining as *amici* herein are concerned that the indefinite detention of immigrant

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* represent that no party other than counsel for *amici* authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), Petitioners and Respondent have consented to the filing of this brief and appropriate letters of consent will be filed with the Clerk of the Court.

A full list of *amici* is included in the Appendix to this Brief.

parolees like Respondent Sergio Suarez Martinez, based solely on unreviewable administrative release determinations, deprives these immigrant parolees of their basic human rights. The government indefinitely detains these individuals in state or federal prison as a means of dispensing with them when, by reason of a criminal conviction, they have been ordered removed to a country of origin that will not accept them back. For an immigrant parolee who already has completed his criminal sentence and thereby paid his debt to society, there should be no mistaking that this so-called "indefinite detention" is no more than an unfair continuation of his punishment. And, it is a punishment that easily could last the rest of his life.

This type of punishment – imprisonment without the opportunity to plead one's case in front of a neutral judge at a reviewable proceeding – offends the moral values shared by a wide array of religious organizations, including *amici*. It is particularly disturbing where, as here, the government has at its disposal statutorily mandated alternatives to imprisonment, such as supervised release, which address all of the government's legitimate concerns, including national security.

Recently this Court embraced *amici*'s view as it relates to the indefinite imprisonment of lawful permanent aliens. Specifically, this Court held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that 8 U.S.C. §1231(a)(6) authorized the detention of a deportable former lawful permanent resident for only "a period reasonably necessary to bring about [an] alien's removal from the United States." 533 U.S. at 689. The Court's reasoning applies with equal force to Respondent Sergio Suarez Martinez, who has lived in the United States since he was paroled into the country twenty-four years ago, even though the government deems him an alien stopped at the border.

In light of the religious and moral imperative to bestow certain fundamental rights on immigrant parolees, including the right not to be imprisoned without due process, and in light of this Court's recent decision clarifying the importance of such rights, Mr. Martinez and other immigrant parolees in his situation must not be subjected to a de facto life sentence without the opportunity for a fair and meaningful hearing. Therefore, *amici* respectfully request that this Court affirm the Ninth Circuit decision below.

ARGUMENT

I. *AMICI*'S PERSPECTIVES ON THESE MORAL ISSUES WILL BE VALUABLE TO THE COURT'S CONSIDERATION OF THIS CASE.

This case presents the issue of whether 8 U.S.C. § 1231(a)(6) authorizes the indefinite detention of an inadmissible alien who was lawfully paroled into the United States in 1980 and has lived here since, but whom the government regards, under a legal fiction, to have been "stopped at the border." This issue involves not only questions of statutory and constitutional interpretation, but also moral and ethical questions. For example, the issue implicates questions of whether a person's loss of liberty constitutes impermissible punishment without crime, a wrongful treatment of a stranger fleeing persecution, or a violation of the dignity and inalienable rights that inhere in each human being.

In the view of *amici*, on moral and ethical issues such as these, religious organizations are an important source to supplement the advice of legislatures, the parties,

and non-religious organizations.[2] First, legislation does not always provide a clear and unequivocal answer to difficult or nuanced human rights questions. *See, e.g., Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcomm. on Immigration & Claims of the House Comm. on the Judiciary*, 107th Cong. 43, 48-55 (2001) (statement of Rep. George W. Gekas, Chair, Subcomm. on Immigration & Claims) (offering into the record "[w]ithout objection" and thereby accepting the relevance to immigration issues of the testimony of Bishop Thomas Wenski, Auxiliary Bishop of Miami, National Conference of Catholic Bishops' Committee on Migration). Second, *amici*'s collective views provide an important guide as to the moral and ethical principles to which a multitude of this nation's citizens – indeed entire civilizations – aspire. Third, *amici* by their nature have experience and expertise in evaluating moral and ethical questions involving immigration, detention, and release.

Additionally, there is precedent for the Court looking to the views of expert authorities in the area of ethics or morality before resolving constitutional questions. In *Atkins v. Virginia*, for instance, this Court cited the brief of *amicus* United States Catholic Conference and other religious organizations as "additional evidence" of a broad "social and professional consensus" against the execution of persons with mental retardation. 536 U.S. 304, 316 n.21 (2002). Similarly, in *Stanford v. Kentucky*, four Justices considered the view of a similar coalition of religious groups in considering the constitutionality of the juvenile death penalty. 492 U.S. 361, 388 n.4 (1989) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (citing briefs of *amici* from various religious organizations including, but not limited to, American Baptist Churches, American Jewish Committee, General Assembly of the Presbyterian Church, United States Catholic Conference, United Methodist Church General Board of Church and Society); *cf. Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (consulting professional organization sources).

Therefore, in light of the assistance these views may provide, this Court should consider the judgment of *amici* herein. As religious bodies and religion-affiliated organizations, these *amici* are uniquely qualified to comment on moral and ethical issues such as those presented by the potentially permanent detention of immigrant parolees.

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[2] The American people place great stock in the contribution religion makes to the public good. *See* John J. Diiulio, Jr., Compassion "In Truth and Action": How Sacred and Secular Places Serve Civic Purposes, and What Washington Should – And Should Not – Do to Help, Speech Before the National Association of Evangelicals (Mar. 7, 2001) (noting that, in the same week the President created the Office of Faith-Based and Community Initiatives, the Pew Charitable Trusts released a national poll showing that most Americans believe local churches, synagogues, and mosques, together with other charitable organizations, are "top problem-solving organizations" in their communities), *available at* http://www.whitehouse.gov/news/releases/2001/03/20010307-11.html.

II. MORAL AND RELIGIOUS AUTHORITY SUPPORT THE RIGHT OF IMMIGRANT PAROLEES NOT TO BE INDEFINITELY IMPRISONED EXCEPT IN NARROW CIRCUMSTANCES WITH STRONG PROCEDURAL PROTECTIONS.

A. Indefinite and Potentially Permanent Detention Constitutes Punishment of Individuals Who Already Have Paid Their Debt to Society.

The human rights values shared by *amici* mandate that all persons living within the United States have the inalienable right to be free from prolonged imprisonment or "indefinite detention" without due process of law. Indeed, the Constitution echoes this value, granting all "'persons' within the United States" the right to be free from punishment, or a deprivation of liberty, "without due process of law." U.S. Const. amend. V; *Zadvydas*, 533 U.S. at 693-94 (citing historical case precedent); *cf. id.* at 690 (explaining that "[f]reedom from imprisonment – from government custody,. detention, or other forms of physical restraint – lies at the heart of the liberty that [the Due Process] Clause protects"). The current parole program – under which those, like Respondent, who have not yet been "admitted" into this country, but who cannot be removed to the country from which they fled and so instead are imprisoned indefinitely and without a meaningful hearing – is not consistent with *amici*'s human rights values or the constitutional mandate.

Notwithstanding the seemingly benign term "indefinite detention," there is no question that what immigrant parolees like Respondent face is punishment. *See Chi Thon Ngo v. INS*, 192 F.3d 390, 397-98 (3d Cir. 1999) (conceding that "[c]haracterizing prolonged

detention as anything other than punishment might be somewhat puzzling to [the detainee], who remained in jail under the same conditions as before the state released him, although his status had technically changed from that of a state inmate to an INS 'detainee'"). The facilities in which immigrant parolees are imprisoned include maximum-security federal and state prisons, local county jails ill-equipped to house inmates for long-term detention, and half-way houses. *See* Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 Scholar 137, 153-54 (2000). Those detained in federal and state correctional facilities are treated the same, if not worse, than the inmates serving criminal sentences. *See id.* at 155. Unlike the inmates serving criminal sentences, however, immigrant parolees have no determinate sentence, awaking each day uncertain as to when or even if they will be released. *See* Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* 289 (2004) ("If I had to tell what it was like to visit the detainees in one sentence it would be this: It is like visiting people who are buried alive.").[3] Thus, in many ways, immigrant parolees receive a harsher punishment for having a particular country of origin than they do for

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[3] As one detainee recounted:

> I would like INS to get me in a plane, give me a parachute, and drop me in the jungle. Somewhere. I'll survive. I'd rather be in a jungle, in the desert, in the middle of the ocean, than be locked up. You know how much suffering you see here? You know what it is like to sit in here and you see your life waste away? Just doing nothing. Being fed like a cow. Because that's what we are – cattle.

Id. at 295.

committing a particular crime. *See Borrero v. Aljets*, 325 F.3d 1003, 1010 (8th Cir. 2003) (Heaney, J., dissenting) (opining that "[n]o matter how unpalatable Borrero's conduct may have been, he has served his time for his criminal acts. It is therefore inconceivable that we would condone the permanent imprisonment of someone simply because his birth country will not welcome him back"; adding that "[a] life sentence in prison [is] no less impermissible than the government's torture or summary execution of those aliens" (second alteration in original) (quotation marks omitted)).

Prolonged punishment is particularly disturbing when, as here, the immigrant parolee already has paid his debt to society by completing his criminal sentence.[4] Yet, under the current immigration parole program, he would continue to serve prison time for that crime long into the future, without the benefit of a fair, reviewable hearing in which the government is forced to justify his further detention. Indeed, given the unlikelihood of U.S. relations with Cuba improving any time soon to the point where Cuba would accept Respondent back, Respondent's "indefinite" prison sentence may well turn out to be permanent. *See Zadvydas*, 533 U.S. at 691 ("The civil confinement here at issue is not limited, but potentially

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[4] *See* Interview with Sergio Suarez Martinez, Detainee [Respondent], INS Service Processing Center, San Pedro, Cal. (Oct. 19, 2001) ("They just lock us up and throw away the key . . . . I understand that I made a mistake, but I already did my time for that. Here I don't even know how much time I have to do."), *quoted in* Michelle Carey, Comment, *"You Don't Know If They'll Let You Out in One Day, One Year, or Ten Years . . .": Indefinite Detention of Immigrants After* Zadvydas v. Davis, 24 Chicano-Latino L. Rev. 12, 12 & n.1, 17 (2003) (explaining the "psychological toll" of indefinite detention on the detainee).

permanent."). This is neither morally acceptable nor reasonable.

B. This Court Recently Embraced *Amici*'s View as It Relates to the Indefinite Imprisonment of Lawful Permanent Residents.

While *amici* and other religious groups long have spoken out against unjust punishment of aliens, this Court put an exclamation point on this view when it issued its opinion in *Zadvydas v. Davis*. In *Zadvydas*, this Court interpreted the post-removal-period statute, 8 U.S.C. § 1231(a)(6),[5] to limit "an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. at 689. Specifically, this Court held that a former lawful permanent resident who demonstrates there is no significant likelihood of removal in the reasonably foreseeable future generally may not be detained under § 1231(a)(6) for more than six months after being ordered removed. *Zadvydas*, 533 U.S. at 700-01. This Court found support for its decision in both the statute itself and in the

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[5] The statute provides in pertinent part:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision . . . .

8 U.S.C. § 1231(a)(6), *quoted in Zadvydas*, 533 U.S. at 682.

inherent due process rights of all "'persons' within the United States." *Id.* at 693.

In *Zadvydas*, two alien petitioners, each of whom previously had been lawfully admitted into the United States, were ordered removed following multiple convictions and sentences for crimes such as attempted burglary, theft, and manslaughter in connection with a gang-related shooting. *Id.* at 684-85. Neither could be returned to his country of origin, however, due to the absence of an agreement between that country and the United States. *Id.* In ruling on a challenge to the prolonged detention of these aliens, this Court held that "the [post-removal-period] statute, read in light of the Constitution's demands, . . . does not permit indefinite detention." *Id.* at 689 (reversing the Fifth Circuit and generally affirming the Ninth Circuit).

The detainees before this Court in *Zadvydas* were former lawful permanent residents, and this Court acknowledged that "[a]liens who have not yet gained initial admission to this country would present a very different question." *Id.* at 682. Still, this Court's reasoning and interpretation of the post-removal-period statute lead to the inescapable conclusion that immigrant parolees like Respondent, who have lived in the United States for many years but who nonetheless are technically considered to have "not yet gained initial admission to this country," should enjoy the same protections afforded to former lawful permanent residents in *Zadvydas*.

In this case, Respondent is a Mariel Cuban[6] who was affirmatively paroled into the United States in 1980,

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[6] Respondent arrived in the United States as part of the "Freedom Flotilla" from Mariel Harbor. The State Department's and President (Continued . . .)

and has been living here ever since. *See* Brief of *Amici Curiae* Florida Immigration Advocacy Center and Rafael Penalver at 17-27, *Benitez v. Mata*, No. 03-7434 (filed Feb. 23, 2004) (describing circumstances of the Mariel boatlift), *available at* 2004 WL 354193. He subsequently was ordered removed on the basis of past criminal conduct and was taken into immigration custody in 2001 following the completion of his criminal sentence. Were it not for the Ninth Circuit's decision that *Zadvydas* applies to this case, which the government now seeks to overturn, he likely still would be imprisoned even though he finished serving his criminal sentence more than three years ago.

Given the political climate in Cuba, Respondent – like the aliens in *Zadvydas* – has no realistic expectation of removal in the foreseeable future. *See Borrero*, 325 F.3d at 1009-10 (Heaney, J., dissenting) ("[S]tatus as a Mariel Cuban provides good reason to believe [a] removal order will not be carried out in the reasonably foreseeable future."). Accordingly, under the regime advocated by the government, short of a fortuitous U.S. and Cuban rapprochement, Respondent could be imprisoned for the rest of his life, subject only to the government's unreviewable discretion. There is no legitimate justification, however, to deny Respondent the basic dignity and worth recently accorded to other aliens by this Court in *Zadvydas*.

Carter's actions in response to this exodus have been interpreted and perceived as an "invitation" by the United States to Cubans seeking "freedom from Communist domination and from economic deprivation . . . ." *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 897 & n.16, 898-99 (N.D. Ga. 1985) (emphasis omitted). Indeed, President Carter welcomed these Cubans to the United States with "an open heart and open arms." *Id.* at 897 & n.16 (emphasis omitted).

C. The Religious Community Encourages the Use of Release Alternatives over Indefinite Detention.

Indefinite detention in this case is particularly punitive in light of the availability and efficacy of alternatives to detention. These alternatives are more humane and therefore more consistent with shared community and religious values.

Religious organizations have long supported release alternatives to immigration detention,[7] particularly when it is indefinite and prolonged, as is the case here. For example, the United States Conference of Catholic Bishops urges that "[a]lternatives to detention should be explored where possible." Mandatory Detention, United States Conference of Catholic Bishops, Office of Migration & Refugee Services (Dec. 19, 2003) (quoting the U.S. Bishops' statement entitled "One Family Under God"), *available at* http://www.usccb.org/mrs/detention.htm. In addition, in testimony before a Congressional subcommittee, Bishop Thomas Wenski highlighted specific examples to demonstrate the success of alternatives to release. *See INS and the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration & Claims of the House Comm. on the Judiciary*, 107th Cong. 20-30 (statement of Bishop Thomas Wenski, Auxiliary Bishop of Miami, National Conference of Catholic Bishops' Committee on Migration) (testifying that "workable alternatives to detention exist"). Bishop Wenski

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[7] *See, e.g.*, Lutheran Immigration and Refugee Service, America: A Freedom Country, at 34-37, 41 (2004) (describing examples of release alternatives to immigration detention), *available at* http://www.lirs.org/InfoRes/PDFs/AsylumStorybook.pdf.

underscored the "remarkable" success of a recent INS-funded pilot project that allowed for the supervised release of more than five hundred noncitizens in categories including "individuals in removal proceedings due to a criminal conviction," and of an INS-supported model that finds jobs, housing, and needed counseling for long-term detainees. *See id.* at 27. He concluded by recommending that the subcommittee "direct the INS to pursue a program of providing alternatives to detention" and "provid[e] a more humane and compassionate response to individuals currently detained." *Id.* at 26-27.

The statute at issue here, § 1231(a)(6), specifically authorizes supervised release as an alternative to detention: "An alien ordered removed . . . may be detained beyond the removal period ***and, if released, shall be subject to the terms of supervision in paragraph (3)***." 8 U.S.C. § 1231(a)(6) (emphasis added). Thus, pursuant to the statute, Respondent, like any immigrant parolee who is released, would remain subject to supervision under regulations prescribed by the Attorney General.[8]

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[8] 8 U.S.C. § 1231(a)(3), entitled "Supervision after 90-day period," provides:

> If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien –
>
> (A) to appear before an immigration officer periodically for identification;
>
> (B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(Continued . . .)

In addressing the government's argument in *Zadvydas* that resident aliens' due process rights were "'greatly diminished' by their lack of a legal right to 'live at large in this country,'" 533 U.S. at 696, the Court emphasized that "[t]he choice . . . is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated." *Id.* (citation omitted); *see also Borrero*, 325 F.3d at 1010-11 (Heaney, J., dissenting) (citations omitted) (agreeing with the district court's proposal of supervised release "because it is ethical, constitutional, and soundly supported by federal statute, and Supreme Court precedent"); *Lin Guo Xi v. INS*, 298 F.3d 832, 834 (9th Cir. 2002) (reversing the district court's dismissal of Lin's habeas petition and noting that "on remand Lin will be entitled to supervised release if he can demonstrate that there is no significant likelihood of his removal to China in the reasonably foreseeable future").

Amici submit that the government should be required to pursue release alternatives as the more ethical and humane – as well as the more constitutionally sound and statutorily consistent – solution in a case such as this, and should not be allowed to resort to indefinite detention except in the most compelling circumstances and where accompanied by adequate procedural protections. Release alternatives to indefinite detention are particularly justified in this case because Respondent already has completed

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(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

serving his sentence for a criminal conviction, yet is facing continued imprisonment solely because the government is unable to effect his removal. The proposed course of supervised release will ensure the government's right to monitor Respondent such that if he violates a condition of his release, the government may return him to detention, subject to legitimate process.

D. All Individuals, Including Immigrant Parolees Living in Our Midst, Are Persons of Dignity and Worth Who Have Inherent Due Process Rights.

It is a fundamental principle shared among a broad cross-section of religious organizations that each human being is a person of inherent dignity and worth.[9] As a person of inherent dignity and worth, each human being is entitled to certain inalienable rights.[10] While *amici* would not go so far as to argue that all people present in this country are entitled to the same rights no matter what their legal status, it is important to recognize that religious traditions often do call for equal treatment of aliens and natives. Thus, while *amici* do not argue herein that immigrant parolees are entitled to ***like*** treatment, they do

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9 *See, e.g.*, National Council of Churches, 2002 General Assembly, Resolution After September 11, 2001: Public Policy Considerations for the United States of America (adopted Nov. 16, 2002) (affirming the "inherent dignity of all persons"), *available at* http://www.ncccusa.org/news/02news97b.html.

10 "[T]he principle of equal rights for citizens and non-citizens alike permeates not only Jewish tradition, but [with few exceptions] the American legal tradition as well." Religious Action Center of Reform Judaism, Issue in Focus: Immigration and Refugees (last updated Jan. 15, 2003), *available at* http://www.rac.org/issues/issueir.html.

argue that immigrant parolees, as human beings living in this country, should have ***some*** significant, fundamental rights under the law.

Among these fundamental rights is the right to be free from punishment at the hands of the government – whether labeled prolonged imprisonment or indefinite civil detention – without due process of law. This right applies to immigrant parolees just as it does to resident aliens and even undocumented aliens, particularly where, as here, there is no real possibility of removal within the reasonably foreseeable future. *See Borrero*, 325 F.3d at 1008 (Heaney, J., dissenting) (finding the majority's effective condemnation of a Mariel Cuban parolee to "indefinite detention because he is countryless, despite completing his time in prison for his criminal acts . . . [a] course of action [that] shocks the conscience and is neither ethical nor constitutional . . . [and] is contrary to other circuits that have addressed the matter").

1. Religious Doctrine Holds a Special Concern for the Immigrant.

Amici submit that immigrant parolees like Respondent are entitled to certain basic human rights, even though they have not been formally "admitted" to this country. This argument is supported by various religious writings advancing the notion that "strangers" such as Respondent not only should be accorded basic human rights, but in fact should receive special care and consideration. Indeed, Jewish and Christian scripture and leaders repeatedly call on the community to watch out for the alien. *See, e.g.*, Lutheran Immigration and Refugee Service, Mission and Values ("In response to God's love in Christ, we welcome the stranger, bringing new hope and new life through ministries of service and justice."),

available at http://www.lirs.org/who/mission.htm.[11] As Bishop Thomas Wenski, Auxiliary Bishop of Miami, stated at the National Conference of Catholic Bishops' Committee on Migration, "[T]he Church . . . is required by the Gospel and by its long tradition to promote and defend the human rights and dignity of people on the move . . . ."[12] Thus, humane treatment of immigrants is of fundamental importance throughout U.S. religious doctrine.

In some U.S. religions the status of the immigrant has particular resonance, as followers have immigrant roots both within their religion and as part of an immigrant nation. For example, the American Hebrew Congregation reminds its followers: "Our people were and continue to be immigrants to this nation. . . . Our tradition demands of us concern for the stranger in our midst." The Union of American Hebrew Congregations, A Resolution on

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[11] *See also* Episcopal Migration Ministries, Theological Premises ("No leap of theology is required to place ministry to displaced, uprooted persons in a fundamental relationship to our Christian calling . . . [and to] 'strive for justice . . . and respect the dignity of every human being'"), *available at* http://dfms.org/3687_32097_ENG_HTM.htm?menu=menu3204; Resolution of the 73rd General Convention of The Episcopal Church, The Episcopal Church in Service to Refugees and Immigrants (July 2000) ("The Church seeks to redress laws and regulations which fail to offer fair and just treatment . . . , to amend policies which overlook compelling family and other humanitarian considerations in carrying out deportation policies, and to assist in the fulfillment of a more just and equitable immigration system."), *available at* http://www.churchpublishing.org/general_convention/pdf_blue_2000/10-execcouncil.pdf.

[12] *INS and the Executive Office for Immigration Review: Hearing supra*, at 20-21 (quoting National Conference of Catholic Bishops, "Resolution on the Pastoral Concern of the Church for People on the Move" (Nov. 11, 1976)).

Immigration Adopted by the General Assembly, at ¶¶ 2-3 (Dec. 3, 1995), *available at* http://uahc.org/conv/adres/imm.html.[13] Similarly, the Episcopal Migration Ministries website states: "To be linked to our immigrant origins and to affirm our nation as one having a vibrant immigrant tradition is to recall our roots as a basis for identifying with those who are repeating, although often under more traumatic circumstances, the journey . . . ." Episcopal Migration Ministries, Theological Premises, *supra* (quotation marks omitted).[14] And referring to a more recent history, some in the Lutheran Church in America recognize that following World War II, "one out of every six Lutherans in the world was a refugee or displaced person." Evangelical Lutheran Church in America, What We Say About Public Life: Immigration, at ¶ 8 (Nov. 16, 1998), *available at* http://www.elca.org/socialstatements/immigration/.[15]

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[13] *See also* Religious Action Center of Reform Judaism, *supra* (noting that as "inheritors of an immigrant history," Jews have both a "unique responsibility . . . to ensure that the rights of non-citizens are not trampled upon today" and a "traditional appreciation for, and interest in, maintaining the civil liberties that have allowed us to thrive in this country").

[14] *Cf.* Mennonite Central Committee, U.S. Guide to Immigration, Biblical Reflection and Church Responses: Standing with Immigrants, at ¶ 2 (2002) ("We believe that God calls us to be accepting of immigrants, because we, too, are sojourners . . . ." (citation omitted)), *available at* http://www.mennonitecc.ca/us/washington/immigration.html.

[15] *See also id.* at ¶ 19 (encouraging members, "in light of our history and our ministry with newcomers, . . . to support just laws that serve the common good"; "We draw on the best of our nation's traditions as a refuge and haven for the persecuted and destitute when we affirm that

(Continued . . .)

Moreover, providing refuge for others fleeing persecution – such as the Mariel Cubans – also is a value that runs deep in the faiths of religious organizations. These values are consistent with our nation's history, in which many religious communities emigrated after fleeing persecution in their home countries for their religious and political views.

2. A Morally Fair and Humane Immigration Policy Can Protect the Rights of Immigrant Parolees without Sacrificing National Security.

Migration policy should honor the key principles of fair and humane process and refugee protection. It is inconsistent with these key principles for the government to indefinitely detain immigrants whose countries will not take them back while subjecting them and their families, many of whom are U.S. citizens or legal residents, to immense suffering.[16] In seeking rights for a seemingly forgotten class of persons – the immigrant parolee – *amici* do not seek to unduly limit Congress' ability to remove inadmissible aliens like Respondent who are paroled into

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'we support a generous policy of welcome for refugees and immigrants.'").

[16] *See Review of Department of Justice Immigration Detention Policies: Hearing*, *supra*, at 56-61 (2001) (material submitted for the hearing record by Ralston H. Deffenbaugh, Jr., President, Lutheran Immigration and Refugee Services); *see also* Physicians for Human Rights Study, From Persecution to Prison: the Health Consequences of the Detention of Asylum Seekers (June 2003) (documenting the high level of suffering on the part of indefinite-term detainees), *available at* http://www.phrusa.org/campaigns/asylum_network/detention_execsummary/detention_pdf.pdf; Carey, *supra*, at 12 & n.1, 17 (same).

the country and subsequently commit acts that subject them to removal. Indeed, in limiting the government's ability to indefinitely detain resident aliens, this Court in *Zadvydas* noted the limitations of its holding: "[W]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." 533 U.S. at 695. A finding by this Court that immigrant parolees, like the resident aliens in *Zadvydas*, cannot be detained indefinitely absent some strong countervailing governmental interest would not unduly interfere with Congress' ability to set immigration policy. Such a finding, however, would be consistent with the fundamental moral and ethical tenets of the various religious organizations represented by *amici* herein, as well as with this Court's interpretation of the post-removal-period statute and the Due Process Clause.

The events of September 11, 2001 have heightened the need to scrutinize those foreigners who are allowed to cross our borders. Neither *amici* nor this Court need interfere with such scrutiny, which is necessary to protect the nation. However, while "governments have an obligation to protect people from violence and to provide security for all who live within their borders," they also "have an obligation to preserve and defend human rights" and "respect ... the inherent dignity of all persons." National Council of Churches, 2002 General Assembly, Resolution After September 11, 2001, *supra*.

This Court rightly took into account in *Zadvydas* the need to balance the government's interest in protecting our borders and citizens with the human and due process rights of resident aliens, finding that special circumstances such as a threat of terrorism might justify detention beyond the presumptive six-month period. 533 U.S. at 690-91.

Indeed, in *Mezei*, the case generally relied upon to justify a distinction between the rights extended to inadmissible as opposed to admitted aliens subject to removal, the Court "explicitly grounded its decision in the special circumstances of a national emergency and the determination by the Attorney General that Mezei presented a threat to national security." *Rosales-Garcia v. Holland*, 322 F.3d 386, 413-14 (6th Cir. 2003) (en banc), *cert. denied*, 539 U.S. 941 (2003) (discussing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)). The *Mezei* Court cited The Passport Act of 1918 as support for the Attorney General's authority to exclude and indefinitely detain Mezei. *See Mezei*, 345 U.S. at 210. Respondent, unlike Mezei, poses no such national security concern, and there is no argument or allegation by the government otherwise. Accordingly, where, as here, the government cannot meet its burden to demonstrate special circumstances warranting indefinite detention, a fair migration policy mandates that an immigrant parolee be released – with conditions – rather than be jailed indefinitely while waiting for a removal that likely never will come.

3. Statutory and Constitutional Law Both Support *Amici*'s Plea to Consider the Dignity and Worth of Immigrant Parolees along with Other Aliens.

Amici's views are based on and consistent with religious teachings and traditions among many U.S. religions. Yet, *amici* do not ask this Court to interpret the law of this land based solely on these teachings and traditions. Rather, *amici* also rely on this Court's own recent decision, which, while based on statutory and

constitutional construction, is in harmony with moral and ethical principles.

a. This Court's Interpretation of the Post-Removal-Period Statute Applies to Immigrant Parolees.

First, *amici*'s view that the indefinite detention of immigrant parolees in these circumstances is wrong and violative of human dignity is consistent with the express language of the post-removal-period statute, 8 U.S.C. § 1231(a)(6), as construed by this Court. In *Zadvydas*, the Court intepreted the post-removal-period statute to limit to a reasonable time an alien's post-removal-period detention: "In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention." 533 U.S. at 689.

Section 1231(a)(6) itself does not distinguish between removal of resident aliens and immigrant parolees. Indeed, on its face § 1231(a)(6) applies to both types of aliens – resident and immigrant – once they have been ordered removed. *See Zadvydas*, 533 U.S. at 688. Thus, while Congress no doubt gave the government the legal authority to detain aliens, including both resident and inadmissible aliens, beyond the initial ninety day removal period, this Court made clear in *Zadvydas* that the government's authority is not without limits. And, as Justice Kennedy wrote in his dissenting opinion in *Zadvydas*, to conclude that inadmissible and removable aliens can be treated differently with regard to how long they may be detained "is not a plausible construction of

§ 1231(a)(6)," as the "text does not admit of this possibility." 533 U.S. at 710 (Kennedy, J., dissenting).

Although in *Zadvydas* this Court did not squarely address the issue of indefinite detention of immigrant parolees, at least two circuit courts of appeal have addressed it. Relying on *Zadvydas*, both the Sixth and Ninth Circuits recently concluded that the Supreme Court's construction of § 1231(a)(6) in *Zadvydas* applies equally to resident aliens and inadmissible aliens subject to removal. *Rosales-Garcia*, 322 F.3d at 404-05 ("On the basis of the plain language of the provision, we find it difficult to believe that the Supreme Court in *Zadvydas* could interpret § 1231(a)(6) as containing a reasonableness limitation for aliens who are removable on grounds of deportability but not for aliens who are removable on grounds of inadmissibility."); *Lin Guo Xi*, 298 F.3d at 835, 839 (concluding that the Supreme Court's construction of § 1231(a)(6) in *Zadvydas* applied to an inadmissible alien; explaining that the provision "does not draw any distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability" and that the right to make "a decision to rearrange or rewrite the statute falls within the legislative, not the judicial, prerogative"). This Court should affirm these logical applications of *Zadvydas*, thereby bringing the law into better alignment with the moral and ethical principles of our nation, which demand humane treatment of resident aliens and immigrant parolees alike.

The government's purported justification for treating immigrant parolees like Respondent differently from the former lawful permanent residents in *Zadvydas* is the so-called "entry fiction" doctrine. Under this doctrine, immigrant parolees living in the United States, even for as long as Respondent has, are treated as if they just arrived at

the border and are seeking to enter the United States for the first time. (Pet'rs' Br. at 14-24.) *Amici* do not herein challenge the "entry fiction" doctrine insofar as it affects the statutory status of a parolee under immigration law. Nor would *amici* deny the government the important right to control immigration into this country, including decisions about who is entitled to "admission." *Amici* do reject the entry fiction doctrine, however, insofar as it is used to deny certain inalienable rights to immigrant parolees, especially those like Respondent who have been living in this country for many years.[17] One of these inalienable rights is the right to be free from indefinite detention without the opportunity to be heard in a neutral, reviewable proceeding.

b. The Constitution Requires That Immigrant Parolees Like Respondent, Who Actually Live in this Country, Not Be Denied Their Liberty Absent Meaningful Due Process.

The right to due process – particularly before being stripped of one's liberty – is fundamental to teachings throughout an array of religious bodies. "All faiths share th[e] basic teaching" that "the denial of rights that inhere in the worth of human beings before God [is] not only a crime against humanity. . . . [but] a sin against God." Robert W. Edgar, National Council of Churches USA, Statement on Due Process and the Guantanamo Prisoners (Mar. 8, 2004), *available at* http://www.ncccusa.org/news/04edgarguantanamostatement.html. It also is a fundamental right provided in the U.S. Constitution. U.S. Const. amend. V. "The great strength of the American system of governance is that it provides its inhabitants with inalienable individual rights, including the right to due process, the right to be punished in proportion to the crime committed, the right not to be imprisoned without cause." Religious Action Center of Reform Judaism, *supra*.

This Court recognized that the fundamental due process right to freedom from physical restraint applies not only to citizens, but to all "'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas*, 533 U.S. at 693 (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Mezei*, 345 U.S. at 212; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 & n.5, 597-98 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)). While this Court in *Zadvydas* did not address whether this right applies to immigrant parolees, its focus on territoriality and physical presence generally supports extending its holding in that case to immigrant parolees, particularly those who have been living in this country for over two decades. *See Zadvydas*, 533 U.S. at 694 (citing with approval *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), in which the Court "held that punitive measures could not be imposed upon aliens ordered removed because 'all persons within the territory of the United States are entitled to the protection' of the Constitution"); *see also Chi Thon Ngo*, 192 F.3d at 396 ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment . . . ." (citing *Wong Wing*, 163 U.S. at 238)); *Wilson v. Zeithern*, 265 F. Supp. 2d 628, 634 n.9 (E.D. Va. 2003) (suggesting that *Zadvydas*, in reaffirming the "territorial distinction," appeared to imply that

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[17] *Amici* have varying views on whether the same rights inhere to non-citizens who literally have been stopped at the border and not paroled into the United States. The Court need not, however, resolve that issue here.

immigrant parolees enjoy a "limited liberty interest based on their physical presence within the United States").[18] Indeed, even in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), where the Court rejected the respondent's claim that the Fourth Amendment's protection against unlawful searches and seizures extended to aliens not present in the United States, the Court was careful to distinguish the scope of the Fourth Amendment – which it found did not extend to people outside the United States – from that of the Fifth Amendment. *Id.* at 264-65 (construing the Fourth Amendment's use of the word "people" to be narrower than the Fifth Amendment's use of the word "persons").

In *Zadvydas*, this Court explained that government detention of persons within the United States violates the Due Process Clause of the Fifth Amendment "unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' non-punitive 'circumstances,' . . . such as harm-threatening

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[18] The logical and moral fallacy of granting due process rights in these circumstances to resident aliens but not to immigrant parolees is highlighted by Petitioners' own brief. Petitioners argue for a hierarchy of due process rights to be accorded aliens of different status, with immigrant parolees making up the bottom rung of the ladder, below undocumented aliens. (Pet'rs' Br. at 2-3.) Petitioners' own justification for this purported hierarchy, however, actually supports Respondent's position here. Citing the 1950 Supreme Court case *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950), Petitioners state that "'[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.'" (Pet'rs' Br. at 3); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."). That very justification works in favor of a parolee like Respondent, who has lived in this country for twenty-four years.

mental illness." 533 U.S. at 690. The Court concluded: "The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect. There is no sufficiently strong special justification here for indefinite civil detention . . . ." *Id.* at 690. Although, as pointed out by the Court, civil detention technically is "nonpunitive," there can be no mistaking that in practice it absolutely constitutes a punishment, which must be meted out only with due process. *See Addington v. Texas*, 441 U.S. 418, 425 (1979) ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

In the case of an alien subject to a removal order that cannot be effectuated due to an impasse in the United States' relations with the alien's nation of origin (for example, Cuba), due process would require a meaningful hearing or other proceeding at which the government would have to justify a detention in excess of the six-month presumptively reasonable period outlined in *Zadvydas*. That hearing or proceeding could not merely be an unreviewable administrative proceeding. As this Court has stated: "[T]he Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.' The Constitution demands greater procedural protection even for property." *Zadvydas*, 533 U.S. at 692 (citations omitted).

This Court has recognized two possible justifications for a prolonged detention pending removal: "'ensuring the appearance of aliens at future immigration

proceedings'[19] and 'preventing danger to the community.'"[20] *Id.* at 690 (citation omitted). Regarding the second justification, the Court pointed out that it has "upheld preventive detention based on dangerousness only when limited to ***specially dangerous individuals*** and subject to ***strong procedural protections***." *Id.* at 690-91 (emphases added). Yet the government would allow indefinite detention of immigrant parolees like Respondent without any meaningful showing of necessity. Denying immigrant parolees these basic due process rights likely would make many of them – particularly Mariel Cubans like Respondent – inmates for life.

CONCLUSION

In light of the important human rights and ethical issues which are at the core of this case, *amici* submit that their perspectives are valuable to the Court's consideration. In particular, *amici* share the view that immigrant parolees should not be punished with imprisonment without first being given the opportunity for a fair and meaningful hearing. As indefinite detention, however labeled, is still punishment by imprisonment, immigrant parolees must not be detained indefinitely absent due process and a strong showing of necessity. Therefore, in accordance with this view, *amici* respectfully request that the Court affirm the Ninth Circuit's decision.

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[19] The Court in *Zadvydas* concluded that the "first justification – preventing flight – is weak or nonexistent where removal seems a remote possibility at best." 533 U.S. at 690. It also stated that if, as here, "removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute." *Id.* at 699-700.

[20] There is no allegation in this case that Respondent is a threat to national security. If there were, and the government could demonstrate as much in a reviewable proceeding, then it would have the ability to detain Respondent beyond the presumptively reasonable six-month period.

Respectfully submitted.

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AUGUST 2004

APPENDIX

AMICI CURIAE

INDIVIDUAL STATEMENTS OF INTEREST

CHURCH WORLD SERVICE

Church World Service (CWS) is the relief, development, and refugee assistance ministry of thirty-six Protestant, Orthodox, and Anglican denominations comprising fifty million United States Christians, along with partnerships in more than eighty countries. This brief is consistent with CWS's belief in the fundamental dignity of all human beings, including the immigrants in our nation. CWS advocates for oppressed people seeking asylum in our land and for just standards to ensure the fair and civilized treatment of refugees and displaced persons worldwide. CWS urges our own nation, a nation of immigrants, to lead the way. Through active dialogue and outreach we seek to make a significant and positive difference in the lives of people whose needs might not otherwise be served.

THE EPISCOPAL CHURCH

The Episcopal Church is made up of over 2.3 million baptized members in approximately 7,300 parishes across the United States and a few related dioceses outside the United States. This brief is consistent with the policies adopted by the July 2000 Resolution of the 73rd General Convention of The Episcopal Church, *The Episcopal Church in Service to Refugees and Immigrants*:

> The Church seeks to redress laws and regulations which fail to offer fair and just

> treatment . . . , to amend policies which overlook compelling family and other humanitarian considerations in carrying out deportation policies, and to assist in the fulfillment of a more just and equitable immigration system.

EVANGELICAL LUTHERAN CHURCH IN AMERICA

The Evangelical Lutheran Church in America (ELCA) is the largest Lutheran denomination in North America and the fifth largest Protestant church body in the United States. The ELCA has approximately 11,000 member congregations, which in turn have approximately 5.1 million individual members nationwide. Through the adoption of social statements and messages by the ELCA Churchwide Assembly, the Church's highest legislative body, and by the Church Council, the ELCA board of directors, the ELCA adopts policy positions and expresses concerns on issues of public importance, such as immigration and refugee policies.

In November 1998, the ELCA Board of the Division for Church in Society approved, and the Church Council adopted, this Church's message on immigration. Together with the Lutheran Church-Missouri Synod, and the Latvian Evangelical Lutheran Church in America, the ELCA sponsors the Lutheran Immigration and Refugee Service (LIRS), a cooperative, national agency to carry out the Churches' ministry with immigrants and refugees.

CLIFTON KIRKPATRICK, STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the Senior Continuing Officer of the

Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,200 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding aliens living and working within the United States. The 2004 General Assembly recently adopted the following resolution:

> Diversity testifies to the glory of God's creation. In a Christian vision, diversity no longer divides and separates or serves as a basis for injustice, but is embraced and transformed through Christ's reconciling activity. Genuine reconciliation takes place through doing justice; namely ensuring that immigrants' personhood is fully respected, the immigrants' presence is acknowledged and welcomed, the immigrants' rights are fully protected, and immigrants are given the opportunity to be full participants in American life. We commit to Advocate for the reform of current immigration policies and procedures to ensure a more timely and humane process.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

MENNONITE CENTRAL COMMITTEE U.S. WASHINGTON OFFICE

Since its inception in 1920, Mennonite Central Committee (MCC) has responded to the needs of emigrating peoples through material aid and spiritual support. As an agency of Mennonite and Brethren in Christ churches in North America, which began as immigrant churches, MCC – through relief, development, peace building and advocacy efforts – works to address the reasons many persons are forced to emigrate, but also to welcome immigrants when they do arrive in the United States and Canada. Injustice toward immigrants – including denial of basic necessities such as food, housing and health care; and distortions of civil rights by labor exploitation, racial profiling or indefinite detention – is contrary to MCC's convictions.

The MCC United States Washington Office, established in 1968, is MCC's advocacy office that provides and encourages the Church's prophetic witness to the way of Christ on matters of United States public policy. The office is guided by the biblical themes of justice for all, with special concern for poor and oppressed people (Deuteronomy 24:17-22); nonviolent peacemaking (Matthew 5:9, 38-48); dismantling racism and sexism (Galatians 3:25-28; Ephesians 2:11-22); human rights, including freedom of conscience and religious practice (Proverbs 31:8-9; Luke 4:18-19; Acts 5:17-42); and care for the earth (Genesis 1:28-30; Psalms 8:5-8).

The MCC United States Washington Office is guided in its immigration advocacy by a 1998 MCC United States Executive Committee statement which says in part: "Scripture teaches that 'when a stranger sojourns with you in your land, you shall not do [the stranger] wrong. The

stranger who sojourns with you shall be to you as the native among you, and you shall love [the stranger] as yourself; for you were strangers in the land of Egypt' (Leviticus 19:33, 34). We believe that God calls us to be accepting of immigrants because we, too, are sojourners. By welcoming the stranger we have welcomed Jesus (Matthew 25:35). Because of God's clear call, we believe we must respond to the plight of immigrants in the United States." The MCC United States Washington Office is also guided by statements of its member denominations, for example: "As Christians, we believe we are called to welcome . . . sojourners in our congregations and communities, especially as our government creates increasingly harsh immigration laws in the name of fighting terrorism. Assumptions about identity make some people more vulnerable to political biases and discrimination than others. Our concerns about the status of immigrants in this country relate to how people are treated based on race, nationality, ethnicity and religious identity. We reject our country's mistreatment of immigrants, repent of our silence, and commit ourselves to act with and on behalf of our immigrant brothers and sisters, regardless of their legal status." (Mennonite Church USA Churchwide Statement on Immigration, 2003).

The MCC United States Washington Office believes that all people, regardless of race, legal status or country of origin, should have access to justice; and that no one, regardless of the policies of their nation of origin, should be subject to indefinite detention based upon their immigration status.

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA

The National Council of the Churches of Christ in the U.S.A. is the principal ecumenical organization in the United States with thirty-six Protestant, Orthodox and Anglican member communions (denominations) with a combined membership of more than fifty million Christians in nearly 140,000 congregations nationwide. Through the National Council of Churches, member communions join in a common witness through ministries of faith, education, public witness and justice. While we do not purport to speak for all members of the communions constituent to the National Council, we do speak for our policy-making body, the General Assembly, whose 350 members are selected by those communions in numbers proportionate to their size.

This *amici* brief is consistent with the National Council's policies and belief in the dignity of all people, which includes immigrants in the United States. We advocate for oppressed people in the United States and around the world, and work to make sure refugees, displaced persons and immigrants receive fair and proper treatment as human beings.

NATIONAL MINISTRIES, AMERICAN BAPTISTS CHURCHES, USA

The American Baptist Home Mission Society, also known as National Ministries, is the home mission and discipleship arm of the American Baptist Churches USA (ABCUSA), an evangelical, ecumenical, multiracial, mission-minded and socially concerned denomination with a global perspective. ABCUSA has 1.5 million members worshipping in 5,800 congregations throughout the United States and is one of the most racially diverse mainline denominations in the United States. It was one of the

founding denominations of Church World Service and has partnered with them in the resettlement of refugees and ministry to immigrants since 1948. Over the past fifty-six years American Baptists have sponsored over 91,000 refugees. Immigration and Refugee Services program has been located in National Ministries since 1955. This brief is consistent with the Policy Statement on Immigration and Refugee Policy adopted by the General Board of ABCUSA.

UNITARIAN UNIVERSALIST ASSOCIATION

The Unitarian Universalist Association is a religious association of more than one thousand congregations in the United States and elsewhere. Through its democratic process, the Association adopts resolutions consistent with its fundamental principles and purposes. The Association has adopted numerous resolutions supporting the civil liberties of citizens and non-citizens alike. The recently adopted 2004 resolution on civil liberties highlights the right of foreign nationals to due process and the presumption of innocence.

Supreme Court, U.S.
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Nos. 03-7434, 03-878

IN THE

Supreme Court of the United States

DANIEL BENITEZ, *Petitioner,*

v.

JOHN MATA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PHIL CRAWFORD, *et al.*, *Petitioners,*

v.

SERGIO SUAREZ MARTINEZ, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, U.S. REPRESENTATIVES JOHN DOOLITTLE, LAMAR SMITH, AND DAVE WELDON, ALLIED EDUCATIONAL FOUNDATION, FRIENDS OF IMMIGRATION LAW ENFORCEMENT, AND NATIONAL BORDER PATROL COUNCIL AS *AMICI CURIAE* IN SUPPORT OF FEDERAL PARTIES

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QUESTIONS PRESENTED

1. Whether 8 U.S.C. § 1231(a)(6) requires the release into American society of an inadmissible alien apprehended at the border of the United States and ordered removed if, after a six-month period of detention, the evidence suggests that there is no significant likelihood that the alien can be returned to his native country in the reasonably foreseeable future -- even when the government has determined that the alien presents a danger to public safety.

2. Whether continued detention of an inadmissible alien apprehended at the border of the United States under the scenario described above violates the alien's substantive due process rights under the Fifth Amendment.

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The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Honorable John Doolittle, the Honorable Lamar Smith, and the Honorable Dave Weldon are United States Representatives from California, Texas, and Florida, respectively. They believe strongly that Congress and the Executive Branch ought to be permitted to protect American citizens by detaining, pending removal, those inadmissible aliens who pose a threat to public safety.

Friends of Immigration Law Enforcement (FILE) is an association of attorneys, researchers, law enforcement officers, legislators, and other experts working on behalf of Americans to ensure that immigration law is being enforced. FILE assists in filing lawsuits and complaints and helps Americans who have been harmed by our government's failure to enforce immigration law.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

Founded in 1965, the National Border Patrol Council is the labor organization representing all (currently about 9,000) non-supervisory U.S. Border Patrol employees. The U.S. Border Patrol is a component of the U.S. Department of Homeland Security, charged with securing the nation's borders.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to detain inadmissible aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of decisions from the Sixth and Ninth Circuits, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies, despite being subject to final orders of exclusion/inadmissibility, despite never having been admitted into the country, and despite repeated INS/ICE determinations that they pose a danger to the community. *Amici* are filing an *amicus curiae* brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous inadmissible aliens outweigh whatever rights those inadmissible aliens may have to live freely within the United States.

Amici are also concerned by the national security and foreign policy implications of the decision below. The Sixth and Ninth Circuits have essentially held that the federal

government is powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. By depriving the government of the option of detaining such individuals until the foreign country agrees to take them back, the Sixth and Ninth Circuits have left a large "'unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

STATEMENT OF THE CASE

Daniel Benitez (Petitioner in No. 03-7434) and Sergio Suarez Martinez (Respondent in No. 03-878) are among 125,000 Cubans who attempted to enter the United States illegally during the 1980 Mariel boatlift. A considerable number of those Cubans (including Benitez) had extensive criminal records while in Cuba:[2] Cuban leader Fidel Castro released numerous individuals from Cuban prisons and mental institutions and included them among those fleeing the Castro dictatorship by boat from the port of Mariel, Cuba. The Mariel Cubans were intercepted along the coast of Florida and were excluded from the United States. However, Castro refused to permit the Mariel Cubans to return home. As a result, the vast majority of the Mariel Cubans (including Benitez and Martinez) were temporarily paroled into this country, pursuant to 8 U.S.C. § 1182(d)(5), until such time as they either: (1)

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[2] Benitez recently told the Miami Herald that he was imprisoned in Cuba in 1973 for committing an armed robbery of a food market. App. 3a. According to the Herald, "Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put on board a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats." *Id. See* "High Court to Decide Fate of Refugee," *Miami Herald* (April 18, 2004) (reprinted at Appendix A).

were deemed eligible for reclassification as resident aliens and permitted to remain here on a permanent basis; or (2) could be returned to Cuba. To date, although many thousand Mariel Cubans have been deemed ineligible for reclassification and ordered removed, less than 2,000 have been repatriated to Cuba.

While free on parole, Benitez and Martinez wasted no time accumulating extensive criminal records. In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft and was sentenced to three years' probation. No. 03-7434, Joint Appendix ("J.A.") 60. In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, he pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale, or delivery of a firearm with an altered or removed serial number. *Id.* at 62. The state court sentenced Benitez to 20 years' imprisonment. *Id.* In 2001, with 12 years remaining on his sentence, Florida paroled Benitez and released him into the custody of the Immigration and Naturalization Service (INS). *Id.* at 61.

Martinez was convicted of numerous crimes while on immigration parole, including assault with intent to murder (1983), burglary (late 1980s), petty theft with a prior conviction (1996 -- for which he received a two year prison sentence), assault with a deadly weapon (1998 -- sentenced to three years imprisonment), and attempted oral copulation by force (1999 -- sentenced to two years imprisonment). Petition in No. 03-878 ("Pet.") 7-8. Following completion of his final prison sentence in California, Martinez was released into the custody of the INS. *Id.* at 8.

Although many other Mariel Cubans paroled into the United States in 1980 were soon thereafter reclassified as permanent resident aliens, both Benitez and Martinez were denied reclassification because of their criminal convictions. J.A. 61. The INS revoked Benitez's immigration parole in 1993 (following his 1993 criminal conviction), and in 1994 found that Benitez was both excludable and deportable because of his criminal convictions. *Id.* 62. The INS revoked Martinez's immigration parole in December 2000 based on his criminal convictions. Pet. 8. In January 2001, an Immigration Judge determined that Martinez is removable and ordered him removed to Cuba. *Id.* Martinez waived an administrative appeal. *Id.* U.S. Immigration and Customs Enforcement ("ICE," the successor to the INS) has been unable to arrange their removal to Cuba, and is unlikely to be able to do so in the near future.

Proceedings Below. On January 11, 2002 (less than sixth months after he had been transferred to INS custody), Benitez filed a petition for a writ of habeas corpus in U.S. District Court for the Northern District of Florida, seeking his release from INS detention. J.A. 3-26. Benitez argued that the INS lacked statutory authority under 8 U.S.C. § 1231(a)(6) to detain him indefinitely following completion of the 90-day "removal period" (which began to run on July 27, 2003, when -- he alleges -- he was taken into INS custody), and also argued that his indefinite detention violated his Fifth Amendment *substantive* due process rights. *Id.* On July 11, 2002, the district judge adopted the magistrate judge's Report and Recommendation and dismissed the petition. *Id.* 44-49. The district judge held that *Zadvydas v. Davis*, 533 U.S. 678 (2001) -- in which the Court held that permanent resident aliens could not be detained indefinitely by the INS pending removal -- was inapplicable to excludable aliens such as Benitez. *Id.* 46. Neither the district judge nor the magistrate

judge addressed whether the *procedures* employed by the INS in determining that Benitez should be detained were constitutionally adequate.

On July 17, 2003, the Eleventh Circuit affirmed. *Id.* 59-83. The court noted that although a Cuban Review Panel had initially concluded that Benitez was releasable subject to certain conditions, the Panel revoked its Notice of Releasability on March 10, 2003 after it determined that Benitez was involved in a planned jail escape. *Id.* 64. The court held, "[I]nadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention." *Id.* 77. Nor did the court believe that 8 U.S.C. § 1231(a)(6) created any *statutory* impediment to Benitez's indefinite detention: "We . . . interpret *Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry." *Id.* 79. The court said that its decision was supported by important national security considerations:

> The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Id. 81. Benitez remains in ICE custody. However, pursuant to a Cuban Review Board order, he may be released as early as July 2004 if he successfully completes a residential drug treatment program.

Martinez filed a habeas corpus petition in July 2002 in U.S. District Court for the District of Oregon, seeking release from INS detention. The following month, the Ninth Circuit issued its decision in *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), which held that § 1231(a)(6) prohibits detention of excludable/inadmissible aliens for more than six months after they have been ordered removed from the country, if there is little prospect that they can be removed in the foreseeable future.[3] Based on the *Lin Guo Xi* decision, the district court issued a one-paragraph order in October 2002, granting the habeas corpus petition and ordering Martinez's release. Petition Appendix in No. 03-878 ("P.A.") at 2a. On August 18, 2003, the Ninth Circuit summarily affirmed; its one-page order cited *Lin Guo Xi* as the basis for its decision. *Id.* 1a. Martinez has been free from ICE detention since March 31, 2003. Pet. 9.

SUMMARY OF ARGUMENT

Section 1231(a)(6) authorizes detention "beyond the removal period" of certain categories of aliens, including aliens (such as Benitez and Martinez) who were apprehended at the border and denied entry, aliens (such as Benitez and Martinez) who are removable because of their criminal records, and aliens (such as Benitez and Martinez) who have

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[3] *Lin Guo Xi* was a purely statutory decision. It did not consider whether there are any constitutional limitations on indefinite detention of excludable/inadmissible aliens; rather, the Ninth Circuit held that its construction of § 1231(a)(6) was mandated by *Zadvydas*.

been determined to be a risk to the community. *Zadvydas* determined that, when applied to permanent resident aliens, § 1231(a)(6)'s authorization of post-removal period detention should be read as including a temporal limitation: such detention is limited to six months plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Zadvydas*, 533 U.S. at 701. But, as the Eleventh Circuit correctly observed, *Zadvydas*'s interpretation of § 1231(a)(6) as applied to permanent resident aliens was driven by its concern that an interpretation that authorized indefinite detention of such aliens would raise serious constitutional concerns. J.A. 80-81. Given that (as *Zadvydas* recognized) permanent resident aliens historically have been accorded significantly greater constitutional protections than have excludable aliens, there is no reason to conclude that *Zadvydas* mandates that the same strict temporal limitations be read into § 1231(a)(6) in cases (as here) involving excludable aliens.[4]

Indeed, there are strong reasons for concluding that Congress did *not* intend § 1231(a)(6) to impose such temporal limitations in cases involving excludable aliens. In particular, any such reading of § 1231(a)(6) would be wholly inconsistent with 8 U.S.C. § 1182(d)(5)(A), which grants the Attorney General broad discretion in determining whether to parole

[4] Immigration law historically used the term "excludable" alien to refer to an alien prevented, either at or before the border, from entering the United States. Such aliens are now classified as "inadmissible." But because the term "inadmissible" also encompasses a number of other categories of aliens, *see* 8 U.S.C. § 1182(a), *amici* throughout this brief continue to use the term "excludable" alien to refer to an alien, such as Benitez or Martinez, intercepted by immigration authorities while attempting to enter the country without permission.

excludable aliens pending removal, and whether to revoke any parole previously granted.

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

There is no sound basis for Benitez's and Martinez's claim that the indefinite detention of an excludable alien determined by the ICE to pose a threat to public safety violates his substantive due process rights. The difficulty with that argument goes beyond the fact that it is foreclosed by this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Critics of *Mezei* assert that it unfairly denied a long-time U.S. resident any hearing at which he could contest the government's secret evidence that he posed a danger to national security. But those critics (including the *Mezei* dissenters) asserted only that Mezei should have been afforded *procedural* due process rights, including an opportunity to be heard on the charges against him. There is virtually no support in the legal literature, and none in this Court's case law, for the proposition that an excludable alien apprehended at the border has a *substantive* due process right to enter the United States when he cannot find another country willing to take him, despite a finding (made following a fair proceeding) that he poses a threat to public safety.

Nor is there any basis for a claim that the Mariel Cubans are entitled to greater substantive due process rights than other excludable aliens. Benitez asserts that the Mariel Cubans were openly invited to come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact. At all times, the Carter Administration opposed the Mariel boatlift and took numerous steps to prevent it from occurring -- including attempting to persuade boat captains not to go to Mariel, attempting to prevent boats from landing at Key West, and fining and indicting boat captains who persisted. Government officials were well aware that a sizeable percentage of those coming on the boatlift were removed from mental hospitals and prisons and placed on board waiting ships by Cuban government officials. But despite screening efforts amid the chaos at Florida ports, the government was successful in detaining only a small percentage of the hardened criminals among arriving passengers; the great majority (including Benitez) slipped through the cracks. The predictable result: a violent crime wave hit Miami and other locations at which Mariel Cubans settled. Mariel Cubans were paroled into this country in large numbers because the government had no realistic alternative in light of our nation's humanitarian tradition and Castro's unwillingness to accept their return. But that parole was conditioned on good behavior. As *Zadvydas* recognized, the government is well within its rights when it chooses to detain an alien pending removal, even if the alien has nowhere else to go, if the alien violates the terms of his prior release.

Finally, a decision denying the government the power to detain indefinitely excludable aliens would pose serious national security concerns. The Ninth Circuit's decision

leaves the federal government powerless to prevent a foreign country from dumping all of its undesirable citizens on our shores and then refusing to take them back. The history of the Mariel Cubans illustrates that such "dumping" operations are more than a theoretical possibility. Moreover, the recent experience with Haiti indicates that attempted illegal entry by sea of massive numbers of foreigners is an ongoing problem and that detention of such foreigners until such time as they can be repatriated may be the only effective means of dealing with the problem.

ARGUMENT

I. § 1231(a)(6) DOES NOT PROHIBIT THE INDEFINITE DETENTION OF EXCLUDABLE ALIENS WHO POSE A PUBLIC SAFETY RISK

The Court held in *Zadvydas* that, at least with respect to permanent resident aliens, 8 U.S.C. § 1231(a)(6) should be interpreted as including "an implicit limitation" on the length of time that aliens may be detained pending deportation. *Zadvydas*, 533 U.S. at 689. Although no *explicit* limitation is set forth in the statute, *Zadvydas* stated that such a congressional limitation could and should be implied, both because the statute includes no "clear indication" that indefinite detention of permanent resident aliens is permissible, *id.* at 697, and because a statute authorizing such indefinite detention "would raise a serious constitutional problem." *Id.* at 690.

Neither of the factors that led the Court in *Zadvydas* to read into § 1231(a)(6) an implicit prohibition on indefinite detention of permanent resident aliens are present in this case. First, both the language and history of the immigration laws provide an unmistakably "clear indication" that Congress did,

in fact, contemplate the indefinite detention of excludable aliens in appropriate circumstances. Second, the "serious constitutional problem" identified in *Zadvydas* is absent here, because the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Accordingly, there are no grounds for reading into § 1231(a)(6) a bar on indefinite detention of excludable aliens demonstrated to pose a threat to public safety.

Section 1231(a)(6) provides that certain categories of aliens "may be detained beyond the removal period." *Zadvydas* held that Congress's use of the word "may" was ambiguous in one critical respect: "[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion" to engage in "long-term detention of unremovable aliens." *Zadvydas*, 533 U.S. at 697. In light of its conclusion that long-term detention of unremovable resident aliens would raise serious constitutional concerns, the Court held that such detention is prohibited by § 1231(a)(6) -- even if the resident alien is adjudged a public safety risk. *Id.* at 699.

But, of course, one category of aliens whose detention is explicitly authorized by § 1231(a)(6) is any alien "who has been determined by the Attorney General to be a risk to the community." If, as *Zadvydas* held, a permanent resident alien awaiting removal cannot be held based *solely* on a determination that he poses a public safety risk, then who did Congress have in mind when it provided for such detention? Congress must have been contemplating such public-safety detention in cases involving excludable aliens, the group that historically has been afforded the lowest level of constitutional protections in connection with immigration proceedings.

Unless § 1231(a)(6) is interpreted as authorizing detention of excludable aliens based on public safety concerns, the statute's "risk to the community" language will have been deprived of all meaning -- because (based on *Zadvydas*) there is no other group whose post-removal period detention Congress could have had in mind when it explicitly authorized "risk to the community" detention.

It is no answer to suggest that Congress inserted the "risk to the community" language into § 1231(a)(6) to authorize short-term detention of dangerous excludable aliens while at the same time prohibiting any such detention for more than six months after the start of the removal period. *Zadvydas* held that § 1231(a)(6) authorizes detention of *all* removable aliens for six months following entry of a final removal order, plus any additional period during which there remains a "significant likelihood of removal in the reasonably foreseeable future." *Id.* at 701. Thus, limiting "risk to the community" detentions to that same period would effectively write the "risk to the community" language out of the statute -- in every case in which an excludable alien could be detained based on his dangerousness, he could also be detained based on the rationale set forth in *Zadvydas*.

Moreover, permitting the detention of excludable aliens based solely on their dangerousness would not constitute a congressional grant of "unlimited discretion," *id.* at 697, nor would it result in "indefinite" detention. By its plain language, § 1231(a)(6) limits such detention to those cases in which the Attorney General has determined that the excludable alien currently poses "a risk to the community," and any such determination is subject to judicial review. *Id.* at 687-88. Once that risk no longer exists, the "risk to the community" language no longer authorizes detention.

Another "clear indication" that Congress contemplated long-term detention of at least some excludable aliens can be seen in 8 U.S.C. § 1182(d)(5)(A). That statute provides that the Attorney General *may* "temporarily" parole certain aliens into the United States without having their entry deemed an "admission" into the country, but it imposes strict limits on the power to grant such parole. Moreover, the statute authorizes the Attorney General in appropriate circumstances to terminate parole and to "return" the alien "to the custody from which he was paroled." When it adopted § 1182(d)(5)(A), Congress was no doubt aware that at least some aliens at the border and seeking to be paroled into the U.S. would not readily be accepted back by their native countries. Accordingly, by adopting a statute that contemplated denial or revocation of parole for some such aliens, Congress could only have been authorizing the indefinite detention of such aliens.

Given Congress's "clear indication" that it did not intend to prohibit indefinite detention of excludable aliens demonstrated to pose a threat to public safety, the doctrine of constitutional doubt can play no role in construing the relevant statutes. "[I]f 'Congress has made its intent' in the statute 'clear, we must give effect to that intent,'" regardless of any constitutional problems caused thereby. *Zadvydas*, 533 U.S. at 697 (quoting *Miller v. French*, 530 U.S. 327, 336 (2000)).

Moreover, Congress's intent must be judged in light of the Court's pronouncements regarding constitutional limitations on detention of excludable aliens. More than 50 years ago, the Court held in *Mezei* that the potentially long-term detention of an excludable alien at Ellis Island raised no concerns under the Due Process Clause, even though the alien could find no other country willing to accept him. *Mezei*, 345 U.S. at 216. In light of *Mezei*, Congress would have had no constitutionally-based reason -- when adopting subsequent

immigration legislation touching on the detention of excludable aliens -- to avoid provisions authorizing long-term detention. Under those circumstances, any effort by the courts to impute such an intent to Congress is not a legitimate form of statutory construction.

In any event, as we explain at more length in Section III, *infra*, the Court has long recognized that excludable aliens enjoy far fewer constitutional rights than aliens who have "gain[ed] admission to our country and beg[un] to develop the ties that go with permanent residence." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982). Regardless whether the Court is prepared to re-affirm *Mezei* in toto, there can be little doubt that Benitez and Martinez possess far fewer due process rights with respect to their immigration status than do permanent resident aliens such as Kestutis Zadvydas -- and thus the "serious constitutional problems" identified in *Zadvydas* are far less weighty in cases, as here, involving the detention of excludable aliens. Under those circumstances, the constitutional concerns that led the Court in *Zadvydas* to read into § 1231(a)(6) an implied limitation on the duration of post-removal period detention of permanent resident aliens have no bearing on whether a similar implied limitation should be read into the statute with respect to the detention of excludable aliens. *See Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) ("Statutes should be interpreted to avoid *serious* constitutional doubts, . . . not to eliminate all possible contentions that the statute *might* be unconstitutional.").

II. PROCEDURAL DUE PROCESS ISSUES ARE NOT PROPERLY BEFORE THE COURT

In his opening brief, Benitez argued for the first time that his continued detention violates his procedural due process rights. Benitez Br. 47, 49. However, that issue is not properly

raised. Neither Benitez nor Martinez made a procedural due process claim in the lower courts, and the lower courts did not pass upon any such claim. Because there is virtually no lower-court record regarding the adequacy of the procedures employed by the INS/ICE in determining that public safety concerns required Benitez's and Martinez's continued detention, it would be wholly inappropriate to permit them to raise that issue for the first time in this Court.

In his Report and Recommendation to the district court, the magistrate judge clearly understood Benitez to be raising only a *substantive* due process claim: "Petitioner asserts that mandatory indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*." J.A. 37. In adopting that report, the district court displayed a similar understanding. *Id.* 44-49. The Eleventh Circuit stated that Benitez was "arguing only that his indefinite detention is impermissible given the Supreme Court's decision in *Zadvydas*" -- a decision that contains no discussion of procedural due process issues. *Id.* 66. The appeals court affirmed without including any discussion of the manner by which the Cuban Review Panel arrived at its decision that Benitez should be detained pending removal.

The record in No. 03-878 is similarly bereft of any indication that Martinez complained about the fairness of the proceedings that led to his post-removal period detention. In ordering Martinez's release from detention, the Ninth Circuit cited solely to its prior decision in *Lin Guo Xi*. *Lin Guo Xi* was a statutorily-based decision: it held that *Zadvydas* required that § 1231(a)(6) be interpreted to prohibit indefinite detention of both permanent resident aliens *and* excludable aliens. *Lin Guo Xi*, 298 F.3d at 836. The Ninth Circuit made no mention of the fairness of the procedures that led to the INS/ICE decision to detain Martinez.

The ICE has adopted detailed procedures for determining whether Mariel Cubans still designated as "excludable" aliens should be paroled into the country, or whether their parole should be revoked. *See* 8 C.F.R. § 212.12. The regulations require the ICE to review all cases involving detained Mariel Cubans at least once a year. 8 C.F.R. § 212.12(g)(2). Mariel Cubans who are unhappy with parole determinations made pursuant to those regulations may seek review in the federal courts under the Administrative Procedure Act. Benitez now claims that those regulations failed to provide him with a fair opportunity to contest his detention. Because he is raising that claim for the first time in this Court and the claim has not been addressed by the lower courts, the Court should decline to address it in the first instance.

III. DETENTION OF EXCLUDABLE ALIENS DETERMINED TO POSE A PUBLIC SAFETY THREAT DOES NOT VIOLATE THE ALIENS' SUBSTANTIVE DUE PROCESS RIGHTS

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property without due process of law." In general, that clause has been understood to require *procedural* fairness before the federal government may take an action depriving a person of life, liberty, or property. *See, e.g., Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

But the Court has recognized that the Due Process Clause also includes a categorical prohibition against certain extreme forms of government conduct that result in deprivation of life, liberty, or property. This categorical prohibition, generally referred to as "substantive due process," "prevents the government from engaging in conduct that 'shocks the conscience' . . . or interferes with rights 'implicit in the

concept of ordered liberty.'" *United States v. Salerno,* 481 U.S. 739, 746 (1987) (quoting *Rochin v. California,* 342 U.S. 165, 172 (1952), and *Palko v. Connecticut,* 302 U.S. 319, 325-326 (1937)). *Amici* submit that there is nothing "shock[ing to] the conscience" about a law that permits the federal government to protect its citizens by detaining those excludable aliens who have been convicted of serious felonies, have been ordered removed from the country, and have been determined to constitute "a risk to the community" if released from detention during the period necessary to effect their removal.

Were Benitez and Martinez citizens, their detention based on dangerousness would raise serious constitutional concerns. In general, government detention of citizens violates substantive due process when imposed outside the context of the criminal justice system. *See, e.g., United States v. Salerno,* 481 U.S. 739 (1987). But, "'[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.'" *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)). *Demore* rejected a substantive due process challenge to the detention, pending completion of removal proceedings, of permanent resident aliens convicted of aggravated felonies.

Dicta in *Zadvydas* suggested that substantive due process protection extends to permanent resident aliens, such that they may not be detained indefinitely based on a finding of dangerousness if they have been ordered removed but can find no country willing to take them.[5] But *Zadvydas*'s discussion

[5] *Zadvydas*'s discussion of substantive due process is largely *dicta*, because the Court ultimately based its decision in the case on its (continued...)

of substantive due process is of little help to Benitez and Martinez, because they are excludable aliens and because *Zadvydas* emphasized repeatedly that permanent resident aliens are entitled to significantly greater constitutional protections than are excludable aliens. *See, e g., Zadvydas*, 533 U.S. at 693 ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). The Court explained:

> It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders. . . . But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.
>
> *Id.*

As *Zadvydas* noted, excludable aliens have long been deemed, for constitutional purposes, never to have entered the country -- even when their place of detention is actually within the United States and regardless that they may have been paroled temporarily into the country while they await removal. *See, e.g., Mezei*; *Leng May Ma v. Barber*, 357 U.S. 185, 188-90 (1958) (alien paroled into the United States pending a determination on admissibility did not effect an "entry").

[5](...continued)
interpretation of a statute, 8 U.S.C. § 1231(a)(6).

The enhanced constitutional status of permanent resident aliens in comparison to excludable aliens makes eminent sense -- the former group generally has been physically present in the United States for a longer period of time and thus has had a greater opportunity to develop close ties with our society and to assume rights and responsibilities that closely resemble those of citizens. Even when an excludable alien has been paroled into the United States for a lengthy period of time, he cannot forge societal ties to the same degree as permanent resident aliens because he knows that his parole is only temporary and is subject to revocation at any time. That is particularly true for Benitez and Martinez, who have spent a significant portion of their years in the United States behind bars and who have known since soon after coming to this country that their criminal records prevented them from ever being reclassified as permanent resident aliens. Of course, no one can know for sure when Fidel Castro will die and how long it will take his successor to normalize relations with the United States. But whether it takes two years or 20 years, Benitez and Martinez have known for many years that they will be removed to Cuba at the earliest available opportunity -- and thus that they have no reasonable basis for seeking to establish permanent ties to this society.

A. Rejection of the Substantive Due Process Claims Does Not Hinge on the Continued Validity of *Mezei*

In *Mezei*, the Court rejected due process claims raised under circumstances largely indistinguishable from the facts of this case. The Court upheld the government's decision to prevent Mezei from entering the country because it deemed him a national security risk; in response to Mezei's claim that the decision to exclude him violated his due process rights, the Court held, "'Whatever the procedure authorized by Congress

is, it is due process as far as an alien denied entry is concerned.'" *Mezei,* 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950)). The Court upheld the exclusion even though it recognized that the practical result was Mezei's indefinite detention at Ellis Island because no other country was willing to accept him. *Id.* at 216. *Mezei* dictates the rejection of Benitez's and Martinez's due process claims. Indeed, Mezei's exclusion and detention were upheld even though he had far stronger ties to the United States than did Benitez and Martinez -- he had lived in the United States as a resident alien for 25 years before traveling to Europe in 1948; his wife and family remained in Buffalo, New York; he attempted to return to the United States less than two years after his departure; and unlike Benitez and Martinez, he had no criminal record.

Benitez and his *amici* have mounted a full-scale assault on *Mezei*, asserting that it is inconsistent with due process decisions that came both before and after. *See, e.g.*, Benitez Br. 45; Brief of *amicus curiae* American Bar Association (ABA); Brief of Law Professors as *amici curiae*. But that criticism is largely beside the point. Detention of excludable aliens found to constitute a danger to public safety is constitutionally defensible without regard to whether the Court chooses to re-affirm *Mezei*. Criticism of *Mezei* has focused largely on its failure to recognize Mr. Mezei's *procedural* due process claims; but such criticism is of little benefit to Benitez and Martinez, because the Questions Presented to the Court do not encompass procedural due process claims.

The initial critics of *Mezei* were the four dissenting justices: Justices Black, Douglas, Jackson, and Frankfurter. The sole basis for their dissents was that the government had denied Mezei *procedural* due process by refusing to disclose any of the evidence upon which it based its finding that Mezei

posed a threat to national security. *Mezei*, 345 U.S. at 218 (Black, J., dissenting) ("[Due process] means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."); *id.* at 227 (Jackson, J., dissenting) ("[W]hen indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them."). Indeed, Justice Jackson explicitly rejected Mezei's claim that his indefinite confinement violated his substantive due process rights. He explained:

> Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. . . . Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. . . . Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a prevention measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. . . . I conclude that detention of an alien would not be inconsistent with substantive due process, provided -- and this is where my dissent begins -- he is accorded procedural due process of law.

Id. at 222-24.

Subsequent critics of *Mezei* focused principally on its refusal to accord *any* procedural due process rights to aliens

protesting their exclusion from the United States. They noted that prior Supreme Court case law had granted at least *some* procedural due process rights to aliens defending against deportation efforts (even aliens who had been in the country only a few days before being detected),[6] and they argued that those same procedural rights should logically be extended to aliens protesting their exclusion. *See, e.g.*, Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 HARV. L. REV. 1362, 1390-95 (1953). But virtually none of the criticism has taken issue with Justice Jackson's view in dissent, that the government would have been within its rights in excluding Mezei from the country if, after a fair hearing, it had demonstrated that Mezei really did constitute a threat to public safety.

The ABA insists that *Mezei* is somehow out of step with the Court's substantive due process case law. ABA Br. 18-23. But the only cases it cites are cases involving the detention of *citizens*. As noted above, the Court has repeatedly held that aliens, and excludable aliens in particular, possess far fewer substantive due process rights than do citizens. *See, e.g.*, *Demore* (upholding detention of aliens even though substantive due process principles would have prohibited detention of citizens in similar circumstances); *Zadvydas*, 533 U.S. at 693 (noting, in connection with discussion of substantive due process rights, that "[t]he distinction between

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[6] *See, e.g., The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1904) (proceedings are constitutionally deficient if an alien facing deportation is not afforded an opportunity to present her case, albeit that opportunity may take the form of an informal administrative hearing). The Court also held that if a person being excluded claims to be a citizen, due process requires that he be provided a hearing on his citizenship claim. *Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908).

an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.").

Amici do not contend that the due process clause provides no substantive protections whatsoever to excludable aliens. For example, any torture of Benitez and Martinez would surely constitute conduct that "shocks the conscience" and thus would violate their substantive due process rights. But given the highly tenuous nature of their connection with the United States, any rights that both they and other excludable aliens may assert with respect to entry into the United States are easily outweighed by the right of the American people to be protected from dangerous criminals.

In sum, *Mezei*'s holding that excludable aliens lack *any* procedural due process rights in connection with their exclusion (and, indeed, that they may be excluded on the basis of secret evidence) has proven to be highly controversial. But even if the Court chooses not to re-affirm this controversial aspect of *Mezei*, it should still rule in favor of the ICE/INS because this Court's case law -- both before and after *Mezei* -- has consistently rejected substantive due process claims asserted by excludable aliens as their basis for contesting exclusion.

IV. MARIEL CUBANS ARE NOT ENTITLED TO GREATER SUBSTANTIVE DUE PROCESS RIGHTS THAN OTHER EXCLUDABLE ALIENS

Benitez and Martinez argue alternatively that even if the great mass of excludable aliens lack substantive due process rights to be free from indefinite detention, the unique position of Mariel Cubans entitles them to such substantive rights. Benitez asserts that the Mariel Cubans were openly invited to

come to this country with the understanding that they would eventually be accepted as political refugees just as soon as enough refugee slots opened up. Benitez Br. 19, 42-43. This revisionist version of history, propounded by both Benitez and his *amici*, is contrary to fact.

The Mariel boatlift began in April 1980 not through any action of the United States (which tried repeatedly to stop the boatlift), but when Cuba's Fidel Castro (acting in response to political unrest) announced that Cubans wishing to leave the country would be free to leave by boat from the port of Mariel. In response, President Carter stated that while the United States was willing to accept up to 3,500 refugees, it opposed any effort by the refugees to enter by boats. *See* "U.S. Intends to Stem Cuban Refugee Tide," *Washington Post* at A1 (April 25, 1980). Prominent Cuban-American leaders were called to a meeting in Washington on April 26 at which senior administration officials pleaded with them to end their support for the boatlift; most of the boats ferrying Cubans from Mariel were American boats that crossed over from Florida. *See* "Angry Cuban-Americans Criticize U.S. Policy on Refugees," *Washington Post* at A1 (April 27, 1980). Administration officials stated that they feared the boatlift "could swamp the country with untold thousands of people seeking to get out of Cuba," but admitted that the boatlift could not be checked "if the Florida Cuban community continues to encourage and finance it." *Id.* One government official "noted that fines of $1,000 for each person brought in illegally are being levied against boat owners engaged in the traffic, and he warned that the government w[ould] move to stiffer penalties, such as criminal prosecutions, if necessary." *Id.*

By May 1, the number of immigrants was approaching 10,000, with no end in sight. *See* "Navy Ships Will Monitor Cuban Boatlift," *Washington Post* at A1 (May 1, 1980). News

reports indicated that large numbers of criminals were included among the immigrants. U.S. Rep. Elizabeth Holzman, a supporter of the boatlift, toured the Key West docks and told the *Post*, "Just about every adult male I have talked to admitted to having been in prison in Cuba." *Id.* The Carter Administration promised to begin screening for criminals; it also stated that in an effort to slow the flood, three boats had been seized. *Id.*

The administration stated on May 5 that it was asking other countries to agree to accept a portion of the immigrants. It was within this context that President Carter, in response to a question, made the May 5 "open arms" statement upon which Benitez places so much reliance. In response to those who argued that the Navy should be preventing ships from landing in Florida, the President said, "We as a nation have always had our arms open to receiving refugees in accordance with American law." In response to Cuban-American leaders who pointed to this statement as a sign of relaxation of American policy opposing the boatlift, Presidential aide Jody Powell "said the president's remarks did not signal a change in overall refugee policy, but an attempt 'to deal with the situation as it exists.'" *See* "U.S. Will 'Open Arms' to Cuban Exiles, Carter Says," *Washington Post* at A1 (May 6, 1980). White House aides later insisted that the May 5 statement had been "misinterpreted" and that the President had always contemplated "strict enforcement of the law against illegal entry." *See* "Carter and the Cuban Influx," *Newsweek* at 22 (May 26, 1980).

By May 14, nearly 40,000 immigrants had arrived in Florida, and President Carter stepped up efforts to halt the boatlift. He "announced that beginning immediately the United States w[ould] accept only Cubans with relatives in the United States, Cuban political prisoners and those Cubans who

ha[d] taken refuge in the U.S. diplomatic mission and the Peruvian Embassy in Havana." *See* "President Moves to Halt Illegal Cuban Boatlift," *Washington Post* at A1 (May 15, 1980). The U.S. offered to provide transit to those individuals, but only if Cuba first agreed "to allow American officials to screen potential refugees in Havana to assure that they fit into one of the four categories." *Id.* Castro simply ignored that policy and continued sending out ships from Mariel. Other efforts -- including a Justice Department attempt on June 2 to turn back a freighter carrying 950 Cubans and the June 24 indictment of 78 people who brought Cubans to Florida in violation of the President's May 15 ban -- failed to stem the tide. Before Cuba unilaterally ended the boatlift on September 26, 125,000 Cubans had made there way to Florida.

No one really knows how many hardened criminals were among that group. The federal government initially detained about 1,800 of the Mariel Cubans as suspected criminals, but the great majority of hardened criminals (including Benitez) slipped through the cracks and were paroled into this country. Many law enforcement officials have estimated that about 40,000 Cuban prison inmates (including at least 20,000 "hardened criminals") were included in the boatlift. *See, e.g.*, "Castro's 'Crime Bomb' Inside U.S.," *U.S. News & World Report* at 27 (Jan. 16, 1984). Miami quickly assumed the title of "murder capital" of the nation, and official attributed at least ½ of all violent crimes in the city to Mariel Cubans. *See* "Trouble in Paradise," *Time* at 22 (November 23, 1981). Scores of domestic airline flights were hijacked to Havana in the early 1980s; more than 90% of the hijackings were attributed to Mariel Cubans.

In sum, nothing about the sorry history of the Mariel boatlift supports Benitez and Martinez's claims. The Mariel Cubans came despite active U.S. efforts to keep them away,

not (as Benitez claims) in reliance on an invitation from President Carter. Benitez could not possibly have relied on any such invitation, because he was taken from prison by Cuban officials and placed involuntarily on a boat. Moreover, the huge amount of crime attributable to the Mariel Cubans underscores the importance of permitting the government to take effective steps to exclude undesirable aliens from the country.

V. NATIONAL SECURITY CONCERNS COUNSEL GRANTING GOVERNMENT POWER TO DETAIN EXCLUDABLE ALIENS INDEFINITELY

Benitez and Martinez arrived at America's shores as part of a group of 125,000 Cubans who attempted to enter the country illegally by boat in the summer of 1980. Once it became clear that Castro would not accept their return to Cuba, the federal government had three options short of admitting the Mariel Cubans as permanent residents: (1) it could turn the boats away and allow them to founder in the high seas; (2) it could detain the Cubans; or (3) it could parole them temporarily into American society until such time as their repatriation could be arranged. The first was not a realistic option in light of our humanitarian traditions. Thus, the United States chose a combination of the second and third options -- it paroled most of the Mariel Cubans pending repatriation, except that it detained (or canceled parole for) those small number of individuals who were determined to pose a threat to public safety.

The Ninth Circuit's decision *requires* the federal government to adopt the third option as a matter of constitutional law. That decision raises serious national security concerns. It leaves the federal government powerless to prevent a foreign country from dumping all of its

undesirable citizens (or a total number of citizens in excess of our capacity to absorb them into our society) and then refusing to take them back. Indeed, the evidence is clear that the Cuban government engaged in just such a "dumping" operation in 1980 in connection with the Mariel Cubans. The Court has made clear that the federal government is entitled to control immigration as a means of protecting national security and thereby ensuring that there is "'no unprotected spot in the Nation's armor.'" *Zadvydas*, 533 U.S. at 695-96 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 602 (1953)).

Numerous courts have recognized that national security concerns are a legitimate basis for detaining excludable aliens pending their repatriation. For example, in upholding the INS's authority to detain excludable aliens who had arrived by boat from Haiti, the Eleventh Circuit observed:

> [T]he Supreme Court has long recognized that the exclusion process is intimately related to considerations of both national security and foreign policy. *See, e.g., Harisiades* [*v. Shaughnessy*], 342 U.S. [580,] 588-89 [(1952)] ("Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . ."); *The Chinese Exclusion Case*, 130 U.S. [581,] 606 [(1889)] (noting that threats to national security can come both "from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us").

Jean v. Nelson, 727 F.2d 957, 977 n.28 (11th Cir. 1984).

Amici recognize that *Jean* involved excludable aliens who were being detained while their exclusion/removal proceedings were ongoing. The INS did not suggest that Haiti would be unwilling to accept the return of its citizens should

their asylum claims be denied. In contrast, Benitez and Martinez have had final orders of exclusion entered against them and (at least at the time they filed their habeas corpus petitions) were facing the prospect of indefinite detention. Nonetheless, the national security concerns that animated *Jean* are equally present in this case. Unless the ICE retains the option of detaining excludable aliens who come to our shores from countries (such as Cuba) that are unwilling to accept their citizens back, there is a serious danger that we will be overwhelmed by increasing numbers of such aliens seeking to enter the United States illegally. Under the Ninth Circuit's decision, those contemplating illegal entry from such countries will be encouraged to do so because they can rest assured that they will be permitted to live indefinitely in the United States, regardless whether they qualify for refugee status and regardless whether they pose a threat to public safety. Congress could not have intended to leave such a massive unprotected spot in the nation's armor.

CONCLUSION

Amici curiae respectfully request that the Court affirm in No. 03-7434 and reverse in No. 03-878.

Respectfully submitted,

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APPENDIX A

Newspaper article from the April 18, 2004 Miami Herald:

HIGH COURT TO DECIDE FATE OF REFUGEE
Daniel Benitez, a Mariel refugee in indefinite detention, wants the U.S. Supreme Court to order his release.

By Alfonso Chardy

DENVER - Daniel Benitez may well become a figure in U.S. legal history when the Supreme Court rules on his case this year.

Benitez, a former Miami resident, is one of two cases the high court will review in October to decide whether immigration authorities can detain foreign nationals indefinitely, including Cuban Mariel inmates whose government refuses to take them back.

Benitez, 46, sums up his predicament simply.

"Let me go free or send me back to Cuba," he said in a recent interview at a federal prison near Denver.

Benitez argued in his October petition to the Supreme Court that there is no valid reason to keep him in detention because he has served his sentence and the high court itself has ruled against indefinite detention.

If the high court agrees, the decision will have a wide impact -- likely resulting in the immediate release of about 900 Mariel detainees at various federal facilities nationwide.

"This case presents an opportunity for the court to redress a long standing injustice," said Judy Rabinovitz of the American Civil Liberties Union who has been at the forefront of the issue.

Though the Supreme Court ruled in 2001 that foreign nationals cannot be detained indefinitely, it did not resolve the question of whether Mariel detainees like Benitez can go free. The reason: the court said foreigners who had technically not gained entry into the country "would present a very different

question" from those lawfully admitted or snuck in. Mariel detainees are considered stopped at the border, thus unadmitted.

The Bush administration interpreted the Supreme Court ruling as exempting Mariel detainees, but not everyone agrees with that analysis. Since the ruling, federal appeals courts have been split, some favoring release; others not.

2 Different Cases

The high court chose two radically different Mariel cases to settle the issue: Benitez, whose appeals court in Atlanta refused release, and Sergio Suarez Martinez, whose appeals court in San Francisco ordered supervised release. Benitez's rap sheet is long. He was first convicted in 1983 and was sentenced to three years probation for grand theft in Dade County. He got convicted again in 1993, also in Dade, for armed robbery, aggravated battery and unlawful possession of a firearm. He was sentenced to 20 years, but served eight.

Sweeping Law

But when Benitez was about to be released early in 2001, immigration authorities took him into custody. A sweeping 1996 law authorizes detention of foreign nationals convicted of felonies pending deportation -- even if the conviction occurred prior to passage of the law.

He started writing legal briefs, asking federal courts to release him, after the Supreme Court ruled that foreign nationals could not be detained indefinitely.

A North Florida federal court rejected his petition. He appealed to the 11th Circuit Court of Appeals in Atlanta, which appointed Jacksonville attorney John Mills to the case. But the 11th Circuit also refused to release him.

Mills then appealed to the Supreme Court asking that it clarify whether its 2001 ruling applies to foreign nationals stopped at the border.

"The statute that Congress enacted to authorize detention of an alien after removal only authorizes temporary detention," Mills said. "The only question is whether the same statute should be interpreted more harshly for Mariel Cubans."

Benitez was at a federal facility in Terre Haute, Ind., when the Supreme Court agreed to take his case. "I was watching TV and heard my name," Benitez recalled, his eyes filling with tears. "I was so excited that I cried."

Benitez has spent time in various federal prisons -- including a medium-security facility near Denver, where he talked about his case, and his life, during a two-hour interview. Divorced, he has no children.

Born in Havana in 1958, Benitez was largely raised by his mother after his father died of a heart attack when he was 10. At age 15, he said, Cuban police arrested him after he and a friend held up a market, stealing money, chickens and a sack of rice.

"My family needed food," Benitez says. "I wanted to bring food in the house. In Cuba, we didn't get anything from the government."

Jehovah's Witness

He said the government denied assistance to his family because his mother was a Jehovah's Witness. Many followers of the religion in Cuba have complained of persecution.

Benitez was still in jail when Mariel happened in 1980. Benitez, then 22, and other prisoners were put aboard a boat whose captain had gone to Mariel to pick up relatives. The Cuban government loaded thousands of criminals on the boats.

Benitez said he fondly recalled his first memory of Key West -- a speedboat whizzing by with a topless woman waving at the refugees.

"It looked like paradise," said Benitez. "Then we were given a speech by a military officer who said, 'welcome to the United States, the land of the free where you will be free.'"

The day after his arrival, Benitez was shipped to the Krome processing center, where a relative signed him out. A week later he had a job as a busboy at a restaurant. His family now wants him home.

"We are hoping the Supreme Court will order his release because there is no greater violation of human rights than to keep someone in detention when he has served his sentence," said Roberto Benitez, 52, Daniel's older brother in Hialeah.

"He's a very talented man," said Emilio de la Cal, a Miami attorney who represented Benitez in South Florida and whose wife is a cousin of Benitez. "He came from Cuba, with no schooling, and no English and now he speaks English and writes very well."

Benitez says he regrets having committed crimes, but should not be kept detained forever.

"I made mistakes," he said. "But I have paid my debt to society and I should be free."